

EDITOR'S NOTE

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84-1244-ATX
Status: GRANTED

Title: Susan J. Davis, et al., Appellants
v.
Irwin C. Bancemer, et al.

ocketed: -
January 31, 1985

Court: United States District Court for the
Southern District of Indiana

Counsel for appellant: Evans, William M., Schaefer, Michael T.

Counsel for appellee: Boehm, Theodore R., Hankins, Grover G.

Entry	Date	Note	Proceedings and Orders
1	Jan 31 1985	G	Statement as to jurisdiction filed.
2	Feb 8 1985	D	Motion of appellants to expedite consideration of the statement as to jurisdiction filed.
3	Feb 8 1985		DISTRIBUTED. Feb. 15, 1985. (Motion to expedite).
4	Feb 12 1985		Composition of Irwin C. Bancemer, et al. to motion of appellants to expedite consideration of the statement as to filed.
5	Feb 19 1985		Motion of appellants to expedite consideration of the statement as to jurisdiction DENIED. Justice Powell CLT.
6	Mar 1 1985		Motion of appellees Irwin C. Bancemer, et al. to affirm filed.
7	Mar 6 1985		DISTRIBUTED. March 22, 1985
8	Mar 4 1985		Brief amicus curiae of Assembly of CA filed.
9	Mar 4 1985	X	Brief amicus curiae of California Democratic Congressional Delegation filed.
10	Mar 15 1985	D	Motion of appellees to strike the brief of Members of the California Democratic Congressional Delegation as amicus curiae filed.
11	Mar 25 1985		Motion of appellees to strike the brief of Members of the California Democratic Congressional Delegation as amicus curiae DENIED. Justice Powell CUT.
12	Mar 25 1985		PROBABLE JURISDICTION NOTED. Justice Powell CUT. *****
13	Apr 15 1985	D	Motion of appellants to expedite and schedule oral argument during 1984 Term filed.
14	Apr 15 1985		DISTRIBUTED. Apr. 19, 1985. (Motion to expedite consideration).
15	Apr 16 1985	X	Brief of Irwin C. Bancemer, et al. in response to appellants' motion to expedite consideration filed.
16	Apr 22 1985		Motion of appellants to expedite and schedule oral argument during 1984 Term DENIED.
17	Apr 26 1985		Joint appendix filed.
18	Apr 26 1985		Brief of appellants Susan J. Davis, et al. filed.
19	May 8 1985		Brief amicus curiae of Senate of California filed.
20	May 8 1985	G	Motion of Mexican American Legal Defense and Educational Fund for leave to file a brief as amicus curiae filed.
21	May 9 1985		Brief amicus curiae of California Democratic Congress filed.
22	May 9 1985		Brief amicus curiae of Assembly of the State of CA filed.
23	May 20 1985		Motion of Mexican American Legal Defense and Educational Fund for leave to file a brief as amicus curiae GRANTED.
24	May 16 1985		Order extending time to file brief of appellee on the merits until June 17, 1985.

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Entry	Date	Note	Proceedings and Orders
27	May 24 1985	D	Motion of appellants for divided argument to permit amicus curiae Mexican American Legal Defense and Educational Fund to present oral argument filed.
28	Jun 1 1985		Record filed.
29	Jun 1 1985		Certified copy of original record, box, received.
30	Jun 10 1985		Motion of appellants for divided argument to permit amicus curiae Mexican American Legal Defense and Educational Fund to present oral argument DENIED.
31	Jun 14 1985		Application for stay filed (A-935).
32	Jun 14 1985		Response requested. Due 6/21/85 - Noor.
33	Jun 14 1985		DISTRIBUTED. June 27, 1985.
34	Jun 17 1985		Brief amicus curiae of Republican National Committee filed.
35	Jun 17 1985		Brief of appellees Irwin C. Banderer, et al. filed.
36	Jun 17 1985		Brief of appellee IN NAACP State Conference of Branches filed.
37	Jun 14 1985		Brief amicus curiae of Common Cause filed.
38	Jun 17 1985		Record filed.
39	Jun 17 1985		Supplemental original record on appeal filed.
40	Jun 17 1985		Logging received. 10 copies.
41	Jun 17 1985		Brief amicus curiae of American Civil Liberties Union, et al. filed.
42	Jun 20 1985		Response to application for stay filed. (A-935)
43	Jun 22 1985		Appellants' response to appellees' opposition filed.
44	Jul 1 1985		The application for stay of the December 31, 1984 order of the United States District Court for the Southern District of Indiana presented to Justice Stevens and by him referred to the Court is denied.
45	Jul 1 1985		Record filed.
46	Jul 6 1985		Certified supplemental record on appeal filed.
47	Jul 6 1985		SET FOR ARGUMENT, Monday, October 7, 1985. (3rd case)
48	Jul 18 1985		Record filed.
49	Jul 29 1985		Two huge certified exhibits received.
50	Jul 29 1985		CIRCULATED.
51	Aug 7 1985		Reply brief of appellants Susan J. Davis, et al. filed.
52	Aug 31 1985	X	Motion of Indiana State Conference of NAACP Branches for leave to file out-of-time motion for divided argument filed.
53	Aug 8 1985	D	Opposition of appellees to motion of Indiana State Conference of NAACP Branches for leave to file.
54	Aug 12 1985		Opposition of appellants to motion of Indiana State Conference of NAACP Branches for leave to file.
55	Aug 14 1985		Motion of Indiana State Conference of NAACP Branches for leave to file out-of-time motion for divided argument DENIED.
56	Sep 18 1985		ARGUED.
57	Oct 7 1985		

84-1244 ①

No. _____

Office - Supreme Court, U.S.

FILED

JAN 31 1985

ALEXANDER L. STEVENS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,

Appellants,

VS.

IRWIN C. BANDEMER, *et al.*,

Appellees.

**APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF INDIANA**

JURISDICTIONAL STATEMENT

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January, 1985

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QUESTIONS PRESENTED

1. Whether the court below in addressing a claim of political gerrymandering refused to follow the decisions of this Court.
2. Whether the decision of the court below in addressing a claim of political gerrymandering is in conflict with other decisions of the U.S. Court of Appeals for the Seventh Circuit.
3. Whether a major political party in Indiana with complete access to the political process and which elects candidates to the Indiana General Assembly in great numbers (Appendix at A-12) and to statewide office on a regular basis (Appendix at A-11) and with enough "safe" seats and "competitive" seats to control both the Indiana House of Representatives and the Indiana State Senate, is a "political group" entitled to the same constitutional protection as racial minority groups.
4. Whether the Indiana Reapportionment Acts can be found to be unconstitutional solely because of a finding of political gerrymandering, where the court below found that they followed the principal neutral criterion of "one man, one vote" (Appendix at A-17) and then the neutral criterion of no minority vote dilution and preserving Black voting strength so that Black representation is proportional to Black population in Indiana (Appendix at A-17), and then in fact followed the neutral criterion of "least changed plan" by preserving the cores of previous districts and avoiding incumbent contests for both Republicans and Democrats and by preserving multi-member districts in the House for both Republicans and Democrats unless all the representatives from any such multi-member districts, of either party or race, requested their district become a single member district (Appendix at A-18).
5. Whether the court below can make a finding of unconstitutional political gerrymandering, based in part

on a finding that proportional representation is not required (Appendix at A-25), but with no finding as to what representation for the minority party is required, and where there is no finding how the court measured baseline political strength.

6. Whether the court below can find political gerrymandering based on the 1982 elections (Appendix at A-11, A-12), where the minority party would have won control of the Indiana General Assembly by wide margins if it had won all "safe" seats and all seats found "competitive" (Appendix at A-11) and where some "vote dilution" will inevitably result from residential patterns regardless of district lines.

7. Whether the court below can place the burden of proof on the Indiana General Assembly itself to prove that its 1981-82 Reapportionment Acts are "necessary in order that the 'one person, one vote' constitutional tenet be preserved" (Appendix at A-30) even though the Indiana General Assembly was found to have followed the principal neutral criterion of one man, one vote (Appendix at A-17) and then the neutral criterion of preserving Black voting strength (Appendix at A-17) and where the two alternate plans of the Plaintiffs were not even presented until 1982 and then did not follow these same neutral criteria.

8. Whether the court below can find an unconstitutional "stacking" of Democrats (Appendix at A-13, A-17, A-19, A-30) concentrated in urban areas (Appendix at A-12, A-18), where Democrats that were Black and concentrated in urban areas were placed in the same district to preserve the same number of Black majority districts as before.

9. Whether the scope of the remedy exceeds the constitutional violations found.

10. Whether there are sufficient findings to support the conclusion of unconstitutional political gerrymandering in the Indiana General Assembly and any evidence to support some of the findings made.

THE PARTIES

Appellants in this proceeding are *Susan J. Davis*, *John Livengood*, and *Thomas S. Milligan*, as members of the Indiana State Election Board, *Laurie Potter Christie*, as Executive Director of the Indiana State Election Board, and *Edwin J. Simcox*, Secretary of State of the State of Indiana. Appellees from Cause No. IP 82-56-C are *Irwin C. Bandemer*, *Obi Badili*, *Ra-Nelle Pearson*, *George Womack Jr.*, *Edward O'Rea*, *John Higbee*, and *David Scott Richards*. Appellees who were originally plaintiffs in the consolidated case, Cause No. IP 82-164-C, are *Indiana N.A.A.C.P. State Conference of Branches*, *Indianapolis Branch N.A.A.C.P.*, *Fort Wayne Branch N.A.A.C.P.*, *East Chicago Branch N.A.A.C.P.* *Thomas Bunnell*, *Edward Richardson*, *James E. Clark*, *Bervin E. Caesar*, *Elizabeth Dobyne*, *Dr. Benjamin Grant*, *John Stott*, and *Eunice Roper Allen*. Appellees by virtue of their status as defendants in the consolidated case (who are not appellants) are *Robert D. Orr*, Governor of the State of Indiana, *J. Roberts Dailey*, Speaker of the Indiana House of Representatives, *Robert D. Garton*, President Pro Tem of the Indiana State Senate, *Richard Mangus*, Chairman of the Standing Committee on Elections and Apportionment in the Indiana House of Representatives, and *Charles Bosma*, Chairman of the Standing Committee of Legislative Apportionment and Elections in the Indiana State Senate.

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No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,

Appellants,

vs.

IRWIN C. BANDEMER, *et al.*,

Appellees.

**APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF INDIANA**

JURISDICTIONAL STATEMENT

In compliance with Rules 12.3 and 15 of the revised rules of this Court, Appellants submit this statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment and decision of the United States District Court for the Southern District of Indiana, sitting as a three-judge court, entered on December 13, 1984, which (1) declared unconstitutional under the Equal Protection Clause of the Fourteenth

Amendment the 1981 Indiana House of Representatives and Senate reapportionment acts and the 1982 amendments thereto; (2) enjoined the Indiana state officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto; and (3) ordered the Indiana General Assembly to enact legislation in 1985 to redistrict the State and reapportion the legislative seats in the General Assembly.

OPINIONS BELOW

The opinion of the three-judge court below is not reported, but the majority opinion and order and the related dissenting opinion by Judge Pell are set out in Appendix A. The court's opinion and order denying Appellants' Motion to Modify or Amend, together with a dissenting opinion by Judge Pell, are set out in Appendix C.

JURISDICTION

This action was initially brought by appellees Bandemer, Badili, Pearson, Womack, O'Rea, Higbee and Richards challenging the 1981 Indiana House and Senate reapportionment acts under the Fourteenth Amendment to the Constitution of the United States, under 42 U.S.C. §1983, and under the Constitution of the State of Indiana. Jurisdiction in the court below was based on 28 U.S.C. §§1331, 1343(a), 2201 and 2284 for the federal constitutional and statutory claims and on pendent jurisdiction for the state constitutional claims. A three-judge panel was appointed pursuant to 28 U.S.C. §2284.

¹A second action, with a different group of plaintiffs (the NAACP plaintiffs) and challenging the reapportionment acts on different grounds, was subsequently filed as Civil Action No. IP82-164-C. By order dated May 3, 1982, the two actions were consolidated by the court below. The issues raised in the second action are not a part of this appeal.

After trial, the three-judge court entered its opinion and order, including injunctive relief, on December 13, 1984. Appellants filed a timely Motion to Modify or Amend (Appendix B) on December 18, 1984, requesting that the court alter or amend its opinion and order. This motion was denied on December 27, 1984 (Appendix C). A notice of appeal (Appendix D) was filed in the United States District Court for the Southern District of Indiana on January 11, 1985, its timeliness and the timeliness of this Statement being governed by 28 U.S.C. § 2101(b) and Rule 12.1 of the revised rules of this Court.

Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. §1253 since the order appealed from involved the granting of an injunction after hearing by a three-judge court. Cases sustaining the jurisdiction of this Court on appeal are *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194-95 (1972).

STATUTES INVOLVED

Section 1 of the fourteenth amendment to the United States Constitution provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The 1981 Indiana House of Representatives and Senate reapportionment acts as amended by the 1982 amendments thereto appear at Ind. Code §§2-1-1.5 and 2-1-2.2 and are set out in Appendix E.

STATEMENT OF THE CASE

Following the 1980 census conducted by the United States Census Bureau, the Indiana General Assembly² began the process of reapportioning the State based on compilations it received from that agency.

On January 13, 1981, House Bill 1475 was introduced in the Indiana House as being relevant to reapportionment. Similarly, Senate Bill 80 was introduced on February 24, 1981. These bills were characterized as "vehicle bills" and were devoid of significant content as filed. Such vehicle bills are used by the legislative leadership of both parties, the Democratic leader in the State Senate, Senator O'Bannon, introducing, for example, nine such vehicle bills in 1981. The reapportionment bills were passed in that form and were referred to the other house where amendments were made. In practical terms, the bills were blank, the amendments insignificant, and the sole purpose for this particular legislative process is to refer both bills to a conference committee.

The reapportionment bills were thus referred to a conference committee for action. The Senate Democratic leadership told the Senate Republican leadership that no Democrat would vote for any reapportionment plan prepared by the Republicans. To advance the legislative process all conferees appointed were Republicans—State Senators Charles E. Bosma and James Abraham and State

²The General Assembly is Indiana's bicameral legislature, consisting of a House of Representatives with 100 members and a Senate with 50 members. House members serve a term of two years and Senate members serve a term of four years with one-half of the Senate members elected every two years. The General Assembly is not a full-time legislature. Rather, in odd numbered years it meets for a maximum of 61 session days, and in even numbered years for a maximum of 30 session days. Apportionment of the state into districts represented in the General Assembly is done by legislative act, signed by the Governor into law. The opinion of the court below gives a more detailed description of the General Assembly (Appendix at A-5, A-6).

Representatives Richard W. Mangus and Norman L. Gerig. All were members of their legislative body's respective elections and apportionment committees. Certain Democratic advisors were appointed, but they had no committee vote.

To aid in the process of legislative map making, the Republican State Committee, a political organization, contracted with a Detroit, Michigan computer firm, Market Opinion Research, Inc. ("MOR"). The Republican State Committee paid Two Hundred Fifty Thousand Dollars (\$250,000.00) for MOR's services and the computer equipment was housed in State Committee headquarters. There was limited access to the equipment and its output. Generally speaking, minority party members had no direct access to the information provided to MOR or to the output from the computers. During reapportionment, however, at the request of minority legislators changes were made in the reapportionment bills to accommodate Democrats and to avoid putting Democratic incumbent Senators into the same district.

Meanwhile, the minority party members did have census compilations provided by the United States Census Bureau from which they began drawing their own map, albeit by less sophisticated means than their Republican counterparts. During these early months of 1981, there were no hearings of any kind with respect to reapportionment. The reapportionment maps and the district lines could not be determined until the computer information was available, and computer tapes were not even available until some time in the middle or latter part of April, 1981.

The majority party, through its conference committee, revealed the product of the MOR-aided map drawing during the last week of the regular 1981 session. After floor debate, certain changes were made in the reapportionment bills to accommodate the wishes of members of the minority party. The conference committee report was

introduced for vote in both houses of the General Assembly on April 30, the final day of the 1981 Regular Session. The Senate adopted the report (Roll Call 673) along party lines, 33 to 15. The House similarly adopted the report (Roll Call 844) along party lines, 59 to 40. The Indiana Journal reports comments by Senator Townsend for April 30, 1981, that the Democrats had forty hours to review the districting of more than 4,000 precincts. The Governor signed the bill into law on May 5, 1981. The procedures followed in the passage of these Acts were in accordance with all rules and legislative procedures of the General Assembly and were substantially the same as those procedures followed in 1965 and 1971. In each of those years the conference committee members were all members of the majority party, which in 1965 was the Democratic Party, and in each case the bills were passed at the very end of the Session.

The General Assembly followed certain neutral criteria in adopting the Indiana Reapportionment Acts in 1981 ("House Plan" or "Senate Plan" or "Acts"). The principal criterion was "one man, one vote", resulting in a population deviation of approximately one percent. Next, the General Assembly tried not to dilute Black voting strength. By the use of a "no retrogression" rule, Black representation was made proportionate to Black population in Indiana and the number of Black majority districts existing before reapportionment was preserved, in spite of the fact that there was a tremendous drop in population in the Black majority districts in the urban areas since the prior reapportionment.³

Subject to these priority guidelines, the General Assembly then followed the neutral criterion of "least changed plan" by not placing two or more incumbents in

³By following these guidelines, the court below found the Indiana General Assembly protected the voting rights of Blacks as Blacks as required by the U.S. Constitution and §2 of the Voting Rights Act of 1965, as amended in 1982.

the same district, by preserving the cores of existing districts, and by continuing existing multi-member districts in the House except where all of the Representatives from any such multi-member district, of either party or race, requested a change to single member districts. Multi-member House districts have been used in Indiana during this century and are used in urban areas with heavy Black population and also in other areas with predominantly white population. A higher percentage of Blacks than whites reside in multi-member districts. They are used whether the members are Democrats, Republicans or both Democrats and Republicans in the same multi-member district. Representation is not proportional between the political parties in the multi-member districts in Marion and Allen Counties in that 86% of the House seats in Marion and Allen Counties are now held by Republicans, but 46.6% of the population, the court below held, are identifiable as Democratic voters.

After passage of the Acts on April 30, 1981, the matter was settled until 1982 when certain revisions were made. During the 1982 Session the Plaintiffs presented the "Crawford Plan" for the House and the "Carson Plan" for the State Senate.

The Crawford Plan changed existing multi-member districts to single member districts and adopted as its own the sixty single-member districts contained in the current House Plan. It changed the districts in Marion, Allen and Lake Counties to maximize the Black vote in those three counties.⁴ The impact on Black voting strength of the Crawford Plan is only known, however, in fifteen of the forty districts it created (listed in Plaintiffs' Exhibit 215, p.6).

The impact on Black voting strength in any of the forty-

⁴These changes were not approved by the court below.

five Senate districts in the Carson Plan not listed in Plaintiffs' Exhibit 215, p. 7, is also not known. The Carson Plan also would have maximized Black voting strength in Marion, Lake and Allen Counties.⁵

In Indiana, there is a heavy concentration of Democratic voters, including Blacks, in the urban counties, but only a minority of Democratic voters scattered throughout the rest of the districts. In the 1980 election, before reapportionment, thirty-five Republicans and fifteen Democrats were elected to the Indiana Senate, and sixty-three Republicans and thirty-seven Democrats were elected to the Indiana House. In the 1982 election, following reapportionment, there was an increase of three Democrats in the State Senate and six Democrats in the Indiana House.

In the Indiana House in 1982, all 100 seats were up for election. Fifty-seven Republican candidates were elected to serve in the Indiana House; forty-three Democrats were elected to the House. In the Indiana Senate, twenty-five seats were up for election. Thirteen Democrats and twelve Republicans were elected to Senate seats.

Based on the 1982 election (called "most significant" by the court below), in the Senate there would have been thirteen "safe" Democratic seats and eighteen seats in the "competitive" range of 45%-55%, totaling thirty-one of the fifty Senate seats. The 1982 election in fact resulted in proportional representation of the two political parties in the Indiana Senate.

In the House, based on the 1982 election there were twenty-eight "safe" Democratic seats and thirty-nine "competitive" seats in the 45%-55% range which gave the minority party an opportunity to win a total of sixty-seven of the 100 House seats if they had won all "safe" and "competitive" seats.

⁵These changes were also not approved by the court below.

In January, 1982, prior to the 1982 elections, this lawsuit was filed by certain Indiana Democratic Party members. In summary, the plaintiffs alleged that the Acts were intended to, and do, discriminate against Indiana Democrats. They claimed that such "political discrimination" is a violation of Fourteenth Amendment guarantees of equal protection as well as Indiana constitutional prohibitions against treating electors unequally and unnecessary division of counties in Senate districting.

A majority of the three-judge court agreed that the Acts were unconstitutional under the Fourteenth Amendment. The court below found the unusual shapes of certain specified House Districts, which however observed township lines, indicated a lack of consistent application of community-of-interest principles.⁶

The court below entered an opinion and order ("Order") December 13, 1984, enjoining Indiana officials from holding elections pursuant to the Acts at any time subsequent to November 6, 1984 and giving the 1985 Session of the Indiana General Assembly, presumably either the regular session or a special session if necessary, the opportunity to enact legislation to comply with the court's order. The court retained jurisdiction to take such further action as it deemed necessary if the General Assembly did not act.

Judge Wilbur Pell of the United States Court of Appeals for the Seventh Circuit, a member of the three-judge panel, concurred in part and dissented in part. He concurred that there was no finding of constitutional or statutory violations insofar as the NAACP plaintiffs were concerned, but dissented from the majority's decision that the Indiana General Assembly had violated the Equal Protection

⁶Compactness was a neutral criterion followed during reapportionment if the "numbers fit". Mangus Deposition, p.52.

clause of the Fourteenth Amendment by diluting the voting strength of the Plaintiffs as Democrats.

On December 18, 1984, State officials asked the court below to clarify its order in certain specific respects, including what priority to assign to its new constitutional prohibition against partisan political gerrymandering, which conflicts in certain important aspects with the neutral criterion used by the Indiana General Assembly of not diluting Black voting strength. (See Appendix B) The court denied this request for clarification by order entered December 27, 1984, Judge Pell concurring in part and dissenting in part. (Appendix C).

THE QUESTIONS ARE SUBSTANTIAL

I. The Decision is Based on a Nonjusticiable Issue and is in Conflict with Prior Decisions of this Court and the Court of Appeals

The court below recognized that in striking down Indiana's reapportionment Acts based upon political considerations alone, it was doing something which no court had ever done before (Appendix at A-21, A-22). Such a lack of supporting precedent is understandable. This Court and the United States Court of Appeals for the Seventh Circuit have consistently held that claims of partisan political gerrymandering are not justiciable, and for good reason.

In *Wiser v. Hughes*, 459 U.S. 962 (1982) and *Andrews v. Hughes*, 459 U.S. 962 (1982), allegations of political gerrymandering of the Maryland Legislature were appealed to this Court. On November 1, 1982, these appeals were dismissed for want of a substantial federal question. See also *Graves v. Barnes* (Graves I), 343 F.Supp. 704 (W.D. Tex. 1972), *aff'd. sub nom. Archer v. Smith*, 409 U.S. 808 (1972); *Kelly v. Bumpers*, 340 F.Supp. 568 (E.D. Ark. 1972), *aff'd*, 413 U.S. 901 (1973); *Wells v. Rockefeller*, 311 F.Supp. 48, 56 (S.D.N.Y. 1970) (Cannella J. concurring), *aff'd*, 398

U.S. 901 (1970) (per curiam); *Kilgarlin v. Martin*, 252 F.Supp. 404 (S.D. Tex. 1966), *aff'd in part and rev'd in part sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967); *WMCA, Inc. v. Lomenzo*, 238 F.Supp. 916 (S.D.N.Y. 1965), *aff'd*, 382 U.S. 4 (1965) (per curiam).

Similar authority can be found in the decisions of the Court of Appeals for the Seventh Circuit. In *Russo v. Vacin*, 528 F.2d 27 (7th Cir. 1976) a claim that ward district lines in Chicago were drawn to minimize the strength of political opponents was dismissed, the Court of Appeals holding that partisan gerrymandering is not justiciable unless absolutely irrational. In *Cousins v. Chicago City Council*, 466 F.2d 830 (7th Cir. 1972) the Court of Appeals held that a claim by a political group that it was disfavored by the drawing of ward district lines "remains among the non-justiciable political questions," relying on *WMCA v. Lomenzo*, 382 U.S. 4 (1965).

Justice John Paul Stevens was a member of the *Cousins* panel. Justice Stevens held that where there is compliance with the population standard, "judicial intervention is not warranted unless the facts dramatically and convincingly foreclose any permissible construction of the Legislature's work", 446 F.2d at 860. Where there is "an attempt to adhere to pre-existing standards", *id.*, or if the district follows natural boundaries, or is compact or is contiguous, and if the said population requirement is met, "rarely if ever would a plan be attacked as wholly irrational", 446 F.2d at 859. As the lower court stated in *Wells v. Rockefeller*, 311 F. Supp. 48, 51 (S.D.N.Y. 1970) *aff'd*, 398 U.S. 901 (1970) (per curiam) (quoting *Jones v. Falcey*, 48 N.J. 25, 222 A.2d 101, 105 (1966)), "it would seem impossible for a court to pass upon the validity of political interests without itself making a political judgment or appearing to do so."

Despite this great weight of authority that the issue of political gerrymandering is not justiciable, the court below relied heavily upon the analysis of Justice Stevens'

concurrence in *Karcher v. Daggett*, 462 U.S. 725 (1983), (Appendix at A-21), a case which turned upon substantially different facts and considerations.

Karcher, of course, was not a Fourteenth Amendment challenge to state legislative districting but an Article I, section 2 challenge to Congressional districting in New Jersey involving competing plans. In addition, even if under the more extreme circumstances present in *Karcher* a "political group" might be considered to have a right to be heard on a contention of political gerrymandering, this is not that case. In *Karcher* it was admitted without dispute that the majority party purposely and intentionally for partisan advantage attempted to place incumbent members of the minority party in the same district, and that an alternate plan, not pitting one minority party incumbent against another and with less population deviation, was presented to the lower court and approved by it. The only proffered justification other than "one man, one vote" for the plan disapproved by the lower court was "no dilution of the Black vote", which the lower court held in fact was not adhered to in the New Jersey redistricting. This markedly contrasts with the situation in Indiana. No incumbent Democratic Senators were placed in the same district, and there was no evidence or finding that House members of either party were placed in the same district where it was not necessary or appropriate because of population shifts to meet the "one man, one vote" requirement.

Some of the questions that must arise in determining what is a "political group" are set out in *Mobile v. Bolden*, 446 U.S. 55, 77, 78 n. 26 (1980). It may well be that the interests of one particular racial or political group may conflict with that of another racial or political group, or even members of the same group. *See id.* at 91 n. 13 (Justice Stevens, concurring). None of these considerations are dealt with in the Order of the court below, despite Appellants' request for clarification (Appendix B).

For any political group to require special constitutional protection under the Equal Protection Clause on account of "vote dilution", it may have to prove that "historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy" because "in contrast to a racial group, however, a political group will bear a rather substantial burden of showing it is sufficiently discrete to suffer vote dilution." *See id.* at 111-112 n. 7, 120 n. 19 (Justice Marshall, dissenting). This Court has never held that the issue of political gerrymandering is justiciable, and the prior decisions of both this Court and the Seventh Circuit Court of Appeals establish that it is not. The constitutional "leap" undertaken by the court below, being thus without foundation in precedent and contrary to existing precedent, is unwarranted and erroneous.

II. The Findings of the Court Below and the Evidence Do Not Support a Conclusion of Unconstitutional Political Gerrymandering.

Even if this Court were prepared to recognize political gerrymandering as a justiciable issue, the findings made by the court below—as well as the findings not made—demonstrate that it was not necessary to reach this constitutional issue. The facts simply do not show a political gerrymander.

It is significant that the court's Order specifically found that the Acts were based upon a series of approved, neutral criteria. Additionally, the Order wholly failed to address issues deemed crucial in *Karcher v. Daggett*, 462 U.S. 725 (1983), the very case upon which the court below relies.

A. Approved, Neutral Criteria Were Used

1. "One Man, One Vote"

The Order finds that the Acts comply with the principal neutral criterion of "one man, one vote" (Appendix at A-17) with a population deviation of 1% (Appendix at A-10). This deviation is well within the range permitted in state

legislative redistricting. In *Brown v. Thomson*, 462 U.S. 835, 77 L.Ed.2d 214, 222 (1983), this Court in approving Wyoming's state legislative redistricting reaffirmed that "an apportionment plan with a maximum population deviation under 10%" requires no justification by the state.

2. "No Minority Vote Dilution"

The Order also finds that when allowable the General Assembly then followed the approved neutral criterion of "no minority vote dilution" and preserved Black voting strength by following the rule of "no retrogression" (Appendix at A-10, A-17). See *Karcher v. Daggett*, 462 U.S. 725 (1983). This resulted in Black majority districts proportional to Black population (Appendix at A-17) despite a ten-year population loss by Senate District 34 in Marion County, a Black majority district, of 34,064, by House District 45 (now 51) in Marion County, a Black majority district, of 56,226 and by House District 5 (now 14) in Lake County, a Black majority district, of 29,592 (SEN 1971 "Black %" and HR 1972 "Black %" in Defendants' Exhibit 1 at Appendix F; Defendants' Exhibit Z).⁷ The court below accordingly found no violation of the Voting Rights Act (Appendix at A-21).

The relative size of racial groups before and after redistricting is, of course, an important consideration in determining the constitutionality of any reapportionment plan, including Indiana's. See, e.g., *Ketchum v. Byrne*, 740 F.2d 1398, 1407 (7th Cir. 1984). In *Rome v. United States*, 446 U.S. 156, 185 (1980), this Court held that electoral changes which lead to retrogression in the position of racial minorities in the exercise of their electoral rights cannot be

⁷The use of the neutral criterion of not diluting Black voting strength also is evident from the reduction of the Black percentages in Old House District 5 (now 14) from 91.2% to 69.9%, in Old House District 45 (now 51) from 63.8% to 61.2%, in Senate District 3 from 84.8% to 71.9%, and in Senate District 34, from 68.1% to 58.4% (SEN 1971 "Black %", HR 1972 Black %, SEN 1982 "Black %" and HR 1982 "Black %" in Defendants' Exhibit 1 at Appendix F).

permitted. See also *Beer v. United States*, 425 U.S. 130, 141 (1976).

The sensitivity of the General Assembly to this criterion is illustrated by Marion County, which preserved its fifteen seat delegation to the Indiana House despite a population decrease (Appendix at A-15). Although House District 45 (now 51) in Marion County had lost more population than the ideal district population size of 54,801 ("HR 1972" in Defendants' Exhibit 1 at Appendix F), the Acts preserved Black voting strength and representation and also maintained Marion County urban representation, rather than converting this Black majority three-member district to a two-member district.

The court below seemed to recognize that the Acts followed the guideline of preserving Black voting strength, but it explained this away by intimating that this was the result of "hindsight and chance" (Appendix at A-18). In fact, contemporaneous newspaper articles report that the neutral criterion of "no dilution of the minority vote" guided the General Assembly throughout reapportionment (Plaintiffs' Exhibits 241, 244, 253; Mangus Deposition Exhibits 2, 8).

Although the court below also found a "stacking" of Democrats (Appendix at A-13, A-17, A-19, A-30) concentrated in urban areas (Appendix at A-12, A-18), this was simply the neutral result of Democrats that were Black and concentrated in urban areas being placed in the same district to preserve Black voting strength as it existed before reapportionment. This was a neutral legislative goal adhered to at all times during the reapportionment process. (Bosma Deposition, pp. 20-1, 52-3, 69; Mangus Deposition, pp. 29-31; Dailey Deposition p. 91). The court below does not suggest that this is any way unconstitutional. There is no evidence or finding that any less "stacking" would not result in the Blacks losing Black majority districts in some or all of these urban areas in Indiana.

In the House, although there are general comments

about "stacking" there are findings of "stacking" only in Marion and Allen Counties (Appendix at A-15, A-16), and there is no finding that this "stacking" was any more than necessary to preserve Black voting strength. The decision discusses in great detail the "bizarre" shapes of certain specific House districts (Appendix at A-14, A-17, A-28, A-29), but concludes only that this indicates no community of interest (*id.*). Several House districts were found to lack compactness, but there is no finding that this lack of compactness resulted in gerrymandering favoring the Republicans. In fact, some of these House districts⁸ were held by Democrats following the 1982 election (Defendants' Exhibit JJ, p. 22). The district lines for three of these House districts held by Democrats were drawn at least in part by the Democratic representatives themselves (Mangus Deposition pp. 54, 57-9).

There is no finding that the configuration of any particular House district or districts was not in fact the result of the neutral criteria of "one man, one vote" and of not diluting Black voting strength. House districts observed township lines (Appendix at A-29), which constitutes a legitimate state interest. *Mahan v. Howell*, 410 U.S. 315, 328 (1973), *modified* 411 U.S. 922 (1973). Compactness itself is not, of course, a federal requirement under the federal constitution, *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), and was followed when the "numbers fit" (Mangus Deposition, p. 52).

3. "Least Changed Plan"

The Acts followed when allowable the neutral criterion of "least changed plan", recognized as proper by this Court, *LaComb v. Grove*, 541 F.Supp. 145 (D. Minn. 1982), *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982). The Acts preserved the cores of prior districts, *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2663 (1983), and avoided where feasible contests between incumbent members of the

⁸District Nos. 25, 42, 43, 66, 70 and 73.

Indiana General Assembly of both parties, *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966); *White v. Weiser*, 412 U.S. 783, 797 (1973).

The Acts also followed the neutral criterion of "least changed plan" by preserving multi-member districts in the House unless the Representatives from any particular multi-member district, regardless of party or race, requested that their district become single-member districts (Appendix at A-18; November Transcript, pp. 140-41; Mangus Deposition pp. 20, 29; Dailey Deposition p. 23; Campbell Deposition p. 143-7, 151-2, 167). The combined use of single-member districts and multi-member districts is quite common in legislatures, occurring in thirteen legislatures in 1981 (Defendants' Exhibit GG). In *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966) this Court found it relevant that the Hawaiian Legislature was dominated by multi-member districts in both houses before statehood and that this feature did not originate with a particular reapportionment plan then under consideration. Similarly, multi-member districts have been used during this century (Appendix at A-19), have had a long and continuous history in Indiana (Defendants' Exhibit EE) and were expressly found to be constitutional by this Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

Moreover, multi-member districts exist in both urban areas and rural areas and are represented by legislators that are Democrats, Republicans, or both Democrats and Republicans in the same district (Defendants' Exhibit HH at Appendix F). For example, House District 31, a two-member district, is represented by a Republican farmer and a Democratic businessman from Gas City, Indiana (Defendants' Exhibit JJ, pp. 22, 29 and 42). This lack of political specificity negates a claim of purposeful discrimination. *Cosner v. Dalton*, 522 F.Supp 350, 362 (E.D.Va. 1981).

Attempting to find other evidence of political discrimination, the court below holds instead that a higher

percentage of Blacks than whites resides in multi-member districts (Appendix at A-18), that 46.6% of the population in Marion and Allen Counties is identified as Democratic while the Republicans won 86% of the House seats in Marion and Allen Counties, all from multi-member districts, and that "such a disparity speaks for itself" (Appendix at A-20). This phenomenon does not, however, connote unconstitutionality. In *Whitcomb v. Chavis*, 403 U.S. 124 (1966), quoted approvingly in *Mobile v. Bolden*, 446 U.S. 55, 79-80, this Court considered a charge of political gerrymandering made in oral argument (403 U.S. at 156 n. 35) and held that the fifteen person multi-member district in Marion County, Indiana, was constitutional even though the minority party had won only one race in five from 1960 to 1968, *id.* at 150. *Whitcomb* thus held it constitutional for the minority party to win exactly the same number of House seats—fifteen—in this ten year period as it would now have if it won only the three seats in Marion County in House District 51 in the next five elections.

B. The Elements Outlined in *Karcher* Were Not Found

The court below made no attempt to relate the concept of "political gerrymandering" to the specific facts of this case. This Court held in *Karcher* that the plan rejected had greater population variances, *Karcher v. Daggett*, ___ U.S. ___, 104 S.Ct. 1691 (1984) (Justice Stevens concurring in denial of stay), and "was designed to produce contests among certain Republican incumbents", *Daggett v. Kimmelman*, 580 F.Supp. 1259, 1263 (1984) (on remand), *aff'd sub nom. Karcher v. Daggett*, ___ U.S. ___, 104 S.Ct. 2672 (1984). There is no evidence or finding by the court below that the Acts were designed to, or resulted in, contests among incumbents of either party which were not unavoidable because of one man, one vote considerations.

The court below also made no finding on the measurement of the baseline strength of a political party in Indiana. The "political group" found disadvantaged by the court was defined as persons who are "Democrats or at least have Democratic voting tendencies" (Appendix at A-19). This group was also defined as those voting for Democratic candidates in either 1956, 1958, 1964, 1972, 1974 or 1980 (Appendix at A-11), as those voting for all Democratic candidates for the House of Representatives in 1982, and as those voting for all Democratic candidates for the Indiana State Senate in 1982 (Appendix at A-12). As Justice Stevens recognized in his concurring opinion in *Karcher*, relied upon heavily by the court below (Appendix at A-21), measurement of baseline strength is "difficult for a political party". *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2672 n. 13 (1983). The court below simply avoided this difficult task and did not attempt to set forth specifically what measurement it had used.

C. The Finding of Intent is Unsupported

This Court has determined that discriminatory purpose is critical to a vote-dilution claim under the Equal Protection clause of the Fourteenth Amendment. *Mobile v. Bolden*, 446 U.S. 55 (1980). In an effort to find such intent, the court below quoted the partisan comments of two Republican legislative leaders (Appendix at A-8 — A-9) and found largely from these comments that the purpose and intent of the General Assembly was to deprive the minority party of its constitutional rights to equal protection. There is no reason to believe, however, that these particular legislative leaders were in any way authorized to speak for the Indiana General Assembly as a whole, or that they were authorized to make these statements in any representative capacity whatever. This Court has held that no member of a legislature, outside the legislature, is empowered to speak with authority for the body. *Regional Rail Reorganization Act Cases*, 419 U.S. 102

(1974). *Accord Strauch v. United States*, 637 F.2d 477 (7th Cir. 1980) (statements by a government official outside the scope of his authority are not binding); *Department of Energy v. Westland*, 565 F.2d 685, 691 (3d Cir. 1977).

Partisan comments and partisan influences are to be expected during the legislative process. In *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), this Court stated:

Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when over-laid on a census map, it requires no special genius to recognize the political consequences of drawing a district along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area.... The reality is that districting inevitably has and is intended to have substantial political consequences.

Moreover, the experience in Indiana demonstrates that political partisan intentions are not always borne out by subsequent events. Before reapportionment in the 1980 election, thirty-five Republicans and fifteen Democrats were elected to the Indiana State Senate, and sixty-three Republicans and thirty-seven Democrats to the Indiana House (Defendants' Exhibit II and Defendants' Exhibit SS). Following reapportionment, in the 1982 election there was an increase of three Democrats in the State Senate and six Democrats in the Indiana House (Defendants' Exhibit JJ, p. 1).

D. The Minority Party Was Not Disadvantaged.

Based on the 1982 election, called "most significant" by the court below (Appendix at A-11), in the Indiana Senate there would have been thirteen "safe" Democrat seats and eighteen seats in the "competitive" range of 45%-55%, *id.*, as

shown in a chart prepared by the Plaintiffs (Plaintiffs' Exhibit 39 at Appendix F), totaling thirty-one of the fifty Senate seats. The 1982 election in fact resulted in proportional representation of the two political parties in the Indiana Senate, as pointed out by the dissenting opinion of Judge Pell (Appendix at A-44).

In the Indiana House, according to a chart prepared by the Plaintiffs but introduced into evidence by the Defendants as Defendants' Exhibit HH (Appendix F), the 1982 election resulted in twenty-eight "safe" Democrat seats and thirty-nine "competitive" seats in the 45%-55% range (Appendix at A-12) which gave the minority party an opportunity to win a total of 67 of the 100 House seats if they had won all "safe" and "competitive" seats. It is inconceivable that a reapportionment scheme which allows the minority party the opportunity to obtain a two-thirds majority could reflect political gerrymandering.

In comparing state-wide races and legislative races the court below apparently again ignored the comments of Justice Stevens in his concurring opinion in *Karcher*, wherein he stated that some "vote dilution" will inevitably result from "residential patterns" where one party is heavily concentrated in the urban areas (as in Indiana). 103 S.Ct. at 2675 n. 27. The source cited by Justice Stevens, Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Minn. L. Rev. 1121, 1127 (1978), expands upon this point:

Aside from those analysts who emphasize physical appearance as a means of identifying gerrymandering, others purport to measure gerrymandering by focusing on the partisan outcome of the legislative election following a redistricting. Analysts using this approach compare the percentage of a party's legislative vote statewide with a percentage of seats gained. Marked disparities

between the two figures are said to indicate the existence of a gerrymander.

This method of identifying gerrymandering, like the first, has major flaws. First, the approach fails to account for the fact that the difference between percentage of vote and number of seats captured may in fact be the result of natural advantages—the inordinate concentration of partisans in one place—rather than any deliberate partisan districting scheme. For example, it is well known that Michigan Democrats are heavily concentrated in Detroit but are in a minority in many other parts of the state. Thus, in every election, Detroit Democrats will win heavily but their excess votes—those above 50%—do their party no good. Similarly, Democrats in out-state Michigan waste votes in those districts where they are a strong but persistent minority. No tolerable districting plan can effectively use either kind of votes, but typical post-election bias measures would show a gerrymander in favor of Michigan Republicans.

There is no evidence or finding that *any* alternate plan of reapportionment in Indiana, regardless of the map maker, with either multi-member or only single member districts, would not also reflect this “wasting” of Democratic votes in areas of high Democratic concentration, assuming that Black majority districts are maintained.

The lower court in *Karcher* on remand also recognized that lack of proportional representation based on state-wide votes and legislative seats won does not prove partisan political gerrymandering. The court held the “computer generated analysis” of the results in each of the proposed congressional districts of several state-wide elections had no “real relevance”. *Daggett v. Kimmelman*, 580 F.Supp. 1259, 1263 (1984), *aff’d sub nom. Karcher v. Daggett*, — U.S. —, 104 S.Ct. 2672 (1984). The court stated:

While it is true that congressional elections are frequently affected by the same issues that influence the outcome of the presidential and senatorial

contests, the patent reality is that they are strongly influenced by the more direct relationship of a Representative with the voters in his own district. Thus the fact that a district may have voted in favor of a senatorial or presidential candidate of one party is hardly a strong predictor of the outcome of a congressional race.

Nevertheless, the court below found “most significant” the results of a 1982 election wherein Democrats were said to have won 51.9% of the legislative votes state-wide, but elected only forty-three Democrats to the House (Appendix at A-12).

III. The Court Below Improperly Shifted the Burden of Proof to the State to Justify its Reapportionment Acts.

In reaching its conclusion of unconstitutional political gerrymandering, the court below improperly shifted the burden of proof to the Indiana General Assembly to prove that its reapportionment plan was “necessary in order that the ‘one person, one vote’ constitutional tenant be preserved” (Appendix at A-30). This approach was based on the concurrence of Justice Stevens in *Karcher*, “in conjunction with” *Mobile v. Bolden*, 446 U.S. 67 (1980). Appendix at A-21.

Under the burden of proof test in *Bolden*, however, the burden of proof never shifts to the state to prove the absence of racial discrimination. The plaintiff must always prove his case in racial voting discrimination cases, except in cases arising under Section 5 of the Voting Rights Act of 1965, not applicable here. *Romé v. United States*, 446 U.S. 156 (1980); *Beer v. United States*, 425 U.S. 130 (1976). In *Bolden*, this Court held that a plaintiff in alleging voting discrimination on account of race “must prove that the disputed plan was ‘conceived or operated’ as [a] purposeful devic[e] to further racial . . . discrimination”, 446 U.S. at 66, and noted that in *White v. Regester*, 412 U.S. 755, (1973) it held that

the plaintiffs had been able to "produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group(s) in question"....In so holding, the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white elected officials. *Id.*

Karcher, the other case relied upon by the court below in shifting the burden of proof, was not a Fourteenth Amendment challenge to state legislative districting but an Article I, section 2 challenge to Congressional districting with an entirely different standard of proof. *Karcher* holds that as between two standards—equality or something less than equality—only the former reflects the aspirations of Article I, section 2. 103 S.Ct. at 2659.

The burden shifted to the state in *Karcher* to justify its Congressional redistricting plan under Article I, section 2 where it could present no acceptable justification for its population variance, and where an alternate plan approved by the court had greater population equality and did not pit incumbents of the minority party against each other. The court below incorrectly assumed that the burden also shifted to the State of Indiana to justify its Acts against a claim of political gerrymandering under the Equal Protection clause of the Fourteenth Amendment, even though the population variances were *prima facie* constitutional and needed no justification, and neutral criteria recognized by this Court in many cases were scrupulously followed.

The alternate plans offered by the Plaintiffs in 1982, after the Acts had been considered and passed in 1981 (Plaintiffs' Exhibits 24, 25), could not possibly allow a presumption against the constitutionality of the Acts because they do not even purport to follow the same neutral

criteria as the Acts themselves. The impact on Black voting strength of the Crawford Plan is only known in fifteen of the forty districts it created. (Plaintiffs' Exhibit 215, p. 6.) The impact on Black voting strength in any of the forty-five Senate districts in the Carson Plan not listed in Plaintiffs' Exhibit 215, p. 7, is also not known. The Crawford Plan changed multi-member districts to single member districts but used the same single member district lines as the House Plan (Mangus Deposition Exhibit 5) which were severely criticized by the court below (Appendix at A-14 — A-17, A-28 — A-29), and it also created unusual district shapes to maximize Black representation in Marion, Lake and Allen Counties (Plaintiffs' Exhibits 202, 207 and 212; Defendants' Exhibits QQ, RR) that were not acceptable or approved by the court below (Appendix at A-20). The Carson Plan did not even purport to concern itself with preserving Black voting strength throughout the State of Indiana, and also created unusual shapes in Marion, Lake and Allen Counties to maximize Black representation (Plaintiffs' Exhibits 204, 209 and 214) that also were not accepted or approved by the court below. *Id.* In sum, the court's shift of the burden of proof to the State was without justification and was erroneous.

IV. The Remedy is Overbroad

The court below made no specific finding of any unconstitutionality in the Senate reapportionment Plan. The opinion referred only to the House Plan as Exhibit A (Appendix at A-14, A-29) and to specific House districts. There is no reference to any specific Senate district that in any way violates any of the neutral criteria established by the decisions of this Court. There are no multi-member districts in the Senate. No incumbents of the party claiming to be disadvantaged were placed in the same Senate district, which was the basis of the political gerrymandering charge in *Karcher*. The 1982 election resulted in proportional representation of the two political parties in the Senate (Appendix at A-44). In short, the court's opinion did not find, and could not have found, any

unconstitutional political gerrymandering in the Senate Plan.

Nevertheless, the court's remedy swept broadly over the Senate Plan as well as the House Plan. Appellants obviously cannot correct any perceived deficiencies in the Senate apportionment plan when none are stated or exist. Accordingly, the injunction is overbroad in its coverage of the Senate Plan and should be vacated.

CONCLUSION

In his separate opinion addressed to Appellants' motion to modify the Order, Judge Pell appropriately characterized the opinion of the court below as one which "roams far and wide into untrod territory with no previous guidelines or prior decisional constitutional justification." (Appendix at A-64) Moreover, the new constitutional doctrine announced by the court was unnecessary since the court's findings and evidence do not support a conclusion of unconstitutionality even under this new rule. For the reasons outlined in this Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Appendix

APPENDIX A

OPINION BELOW

UNION STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IRWIN C. BANDEMER, OBI)
BADILI, RA-NELLE)
PEARSON, GEORGE WOMACK)
JR., EDWARD O'REA, JOHN)
HIGBEE, DAVID SCOTT)
RICHARDS,)

Plaintiffs,)

v.)

SUSAN J. DAVIS, JOHN)
LIVENGOD, and THOMAS)
S. MILLIGAN, as members)
of the Indiana State Election)
Board; LAURIE POTTER)
CHRISTIE, as Executive)
Director of the Indiana)
State Election Board; and)
EDWIN J. SIMCOX, Secretary)
of State of the State)
of Indiana,)

Defendants.)

*****)

CAUSE NO.
IP 82-56-C

INDIANA N.A.A.C.P. STATE)
 CONFERENCE OF)
 BRANCHES; INDIANAPOLIS)
 BRANCH, N.A.A.C.P.;)
 FORT WAYNE BRANCH)
 N.A.A.C.P.; GARY BRANCH)
 N.A.A.C.P.; EAST CHICAGO)
 BRANCH THOMAS BUNNELL:)
 EDWARD RICHARDSON;)
 JAMES E. CLARK; BERVIN)
 E. CAESAR; ELIZABETH)
 DOBYNES; DR. BENJAMIN)
 GRANT; JOHN STOTT; and)
 EUNICE ROPER ALLEN,)

Plaintiffs,)

v.)

ROBERT D. ORR, Governor, State)
 of Indiana; SUSAN J. DAVIS,)
 JOHN LIVENGOOD, and)
 THOMAS MILLIGAN, Members,)
 Indiana State Election)
 Board; LAURA POTTER)
 CHRISTIE, Executive Director,)
 Indiana State Election)
 Board; EDWIN J. SIMCOX,)
 Secretary of State, State)
 of Indiana; J. ROBERTS)
 DAILEY, Speaker, Indiana)
 House of Representatives;)
 ROBERT D. GARTON, President)
 Pro Tem, Indiana State Senate;)
 RICHARD MANGUS, Chairman,)
 Standing Committee on Elections)
 and Apportionment, House of)
 Representatives and CHARLES)

CAUSE NO.
 IP 82-164-C

BOSMA, Chairman Standing)
 Committee of Legislative)
 Apportionment and Elections,)
 State Senate,)

Defendants.)

Before PELL, Senior Circuit Judge, NOLAND, Chief
 District Judge, and BROOKS, District Judge.

OPINION

JAMES E. NOLAND, Chief District Judge and GENE
 E. BROOKS, District Judge.

These Findings of Fact and Conclusions of Law are
 entered in the above-captioned causes in memorandum
 form, pursuant to Rule 52(a), Federal Rules of Civil
 Procedure.

These lawsuits were heard by a three-judge panel
 appointed by The Honorable Walter J. Cummings, Chief
 Judge, Seventh Circuit, United States Court of Appeals.
 United States Circuit Judge Wilbur F. Pell, Jr., presided
 over the panel which heard testimony on October 12, 1983,
 and November 16, 1983, in addition to the admission of
 several maps and documents as evidence in the cases. Oral
 arguments on behalf of all parties were heard January 23,
 1984 after submission of post-trial briefs.

Both lawsuits were heard pursuant to 28 U.S.C. §2284
 which requires the appointment of a three-judge panel
 when legislative reapportionment is challenged. On
 January 23, 1984 the panel announced unanimously that
 while its opinion would be entered as soon as possible, the
 effective date of the decision would be subsequent to the
 conduct of the 1984 election.

PARTIES-COMPLAINTS

On January 12, 1982, the IP 82-56-C lawsuit was filed in the Southern District of Indiana, Indianapolis Division, by seven (7) plaintiffs, all stipulated as citizens of Indiana and members of the Democratic Party: Irwin C. Bandemer, Obi Badili, Ra-Nelle Pearson, George Womack, Jr., Edward O'Rea, John Higbee, and David Scott Richards. The defendants in the lawsuit (hereinafter referred to as the "Bandemer case") were Susan J. Davis, John Livengood, and Thomas S. Milligan, members of the Indiana State Election Board; Laurie Potter Christie, Executive Director of the Indiana State Election Board; and Edwin J. Simcox, Secretary of State for the State of Indiana.

On February 2, 1982, the IP 82-164-C lawsuit was filed in the Southern District of Indiana, Indianapolis Division, by five (5) organizations—The Indiana N.A.A.C.P. State Conference of Branches, along with the individual branches from the cities of Indianapolis, Fort Wayne, Gary, and East Chicago—and eight (8) individual citizens of Indiana: Thomas Bunnell, Edward Richardson, James E. Clark, Bervin E. Caesar, Elizabeth Dobynes, Dr. Benjamin Grant, John Stott, and Eunice Roper Allen. The defendants in the lawsuit (hereinafter referred to as the "NAACP case") include Indiana Governor Robert D. Orr, Indiana Speaker of the House J. Roberts Dailey, Indiana Senate President Pro Tem Robert D. Garton, the chairmen of the legislative committees on elections and apportionment, Richard Mangus and Charles Bosma, and all defendants previously listed in the Bandemer case. The panel ruled both cause numbers would be consolidated for all purposes, including trial, by order dated May 3, 1982.

In summary, the Bandemer case plaintiffs allege that the Indiana apportionment law enacted by the state legislature and signed by the Governor into law in 1981 was intended to, and does, discriminate against Indiana Democrats. They claim that such is a violation of Fourteenth

Amendment guarantees of equal protection as well as Indiana constitutional prohibitions against treating electors unequally (Ind. Const. art. 2, §1) and unnecessary division of counties in Senate districting (Ind. Const. art. 4, §6).

In summary, the NAACP case plaintiffs allege the House redistricting plan included in that 1981 apportionment act and amendments thereto intentionally fragments black population concentrations in Lake and Marion counties.

THE INDIANA LEGISLATURE

The Indiana Constitution provides for a bicameral state legislature which is denominated "the General Assembly" and consists of a House of Representatives and a Senate. Ind. Const. art. 4, §1. The Indiana Senate (hereinafter "the Senate") consists of fifty (50) members representing identified districts of the state. Apportionment of those districts is done by legislative act and signed by the Governor into law. The members of the Senate serve four-year terms. The terms are staggered in that only one-half of the members are subject to re-election during a traditional even-numbered general election year. The Indiana House of Representatives (hereinafter "the House") consists of one hundred (100) members who also represent identified districts in the state. Apportionment of those districts also is done by legislative act and signed into law by the governor. The members of the House serve two-year terms, thus placing the entire membership in elections every two (2) years.

The state legislature (referred to as the "General Assembly" in future references to the combined legislature) meets for a finite term of days. In other words, the General Assembly is not a full-time legislature. A "regular session" of the General Assembly occurs during the first calendar year of a two-year term. Thus, in odd-numbered years, the General Assembly meets in a "regular

session". By law, the General Assembly may convene for sixty-one (61) session days, but in no event may it conduct business beyond April 30. During the second year of the two-year term, an even-numbered year, the General Assembly is empowered to meet for thirty (30) session days. The session may not extend beyond March 15. See, Ind. Code §§2-2.1-1-1(a), 2-2.1-1-3. The Governor is empowered by the state's constitution to call the General Assembly into special session, regardless of the other restrictions on the length and time of session. Ind. Const. art. 4, §9.

The Indiana Constitution also requires the General Assembly to authorize a "periodical enumeration" of the state's population and authorizes that legislative body to apportion representation thereafter. Traditionally, the state makes use of the federal decennial census compilations in performing reapportionment.

Control of the General Assembly is crucial to a political party for a number of reasons. The majority party elects the Speaker of the House, a person who wields considerable power in the assigning of bills to committees, the conduct of the actual legislative sessions, and is empowered, under legislative rules, to prevent bills from reaching the floor for debate or vote. Similarly, the majority party elects floor leaders in both houses who control the flow of legislation, the assignment of members to committees, and the appointment of committee chairmen. All of these powers are important to the achievement of a party's legislative goals. There is little doubt that the minority party plays a less substantial role in the drafting and enactment of legislation.

1981-1982 REAPPORTIONMENT LEGISLATIVE PROCESS

Among the issues raised in both lawsuits is the process by which the General Assembly enacted reapportionment laws in the 1981 and 1982 sessions. Following the 1980 census conducted by the United States Census Bureau, the

General Assembly commenced the process of reapportioning the state based on compilations it received from that agency.

On February 13, 1981, House Bill 1475 (H.B. 1475) was introduced in the Indiana House as being relevant to reapportionment. Similarly, Senate Bill 80 (S.B. 80) was introduced on February 24, 1981. These bills are characterized as "vehicle bills." The actual bills filed in the legislative houses were devoid of significant content. For instance, the House bill sought to amend the definitional section of reapportionment law for that body. There was no description of districts and the bill itself was quite brief. The substance appeared to be only a 12-line paragraph. A similar bill containing three (3) paragraphs was introduced as S.B. 80. The bills were passed in that form and were referred to the other house where amendments were made. In practical terms, the bills were blank, the amendments insignificant, and the sole purpose for this contrived legislative process was to refer both bills to a conference committee.

The political structure of the conference committee introduces a crucial element into the legislative scheme chosen by the Republican majority in both houses of the General Assembly. All conferees were Republicans—State Senators Charles E. Bosma and James Abraham and State Representatives Richard W. Mangus and Norman L. Gerig. All were members of their legislative body's respective elections and apportionment committees. The lone Democrats with any input in the conference process were four persons appointed as "advisors": W. Wayne Townsend, Julia M. Carson, Lindel O. Hume, and Thomas S. Kromkowski. The Democratic advisors had no committee vote and no access to the mapmaking process that ensued.

To aid in the process of legislative mapmaking, the Republican State Committee, a political organization, contracted with a Detroit, Michigan computer firm,

Market Opinion Research, Inc. (hereinafter "MOR"). The Republican State Committee paid Two Hundred Fifty Thousand Dollars (\$250,000.00) for MOR's services and the computer equipment was housed in State Committee headquarters. There was limited access to the equipment and its output, and no minority party members ever had access to the information provided to MOR or to the various outputs from the computers.

Meanwhile, the minority party members did have census compilations provided by the United States Census Bureau from which they began drawing their own map, albeit by less sophisticated means than their Republican counterparts. During these early months of 1981, there were no hearings of any kind with respect to reapportionment. The majority party, through its conference committee, revealed the product of the MOR-aided map drawing during the last week of the regular session. At the same time, the Democrats revealed their proposed maps, introduced by black legislators Rep. William Crawford and Sen. Julia M. Carson (hereinafter referred to as the "Crawford Plan" and the "Carson Plan"). These alternative plans are relevant to both the Bandemer and NAACP cases.

The process underlying the reapportionment proceedings was fiercely competitive and unashamedly partisan. There is a clear impression that the majority party felt insulated from challenge merely by adherence to the "one-person, one-vote" principle, which they could easily follow with the aid of a computer. The result of that attitude is revealed in the remarkably candid statements of both Speaker Dailey and Senator Bosma in their deposition testimony:

MR. SUSSMAN: What I would like you to do here again is to give me whatever reasons were operative to your mind in maintaining or creating multi-

member districts with regard to (Districts) 48 through 52.

MR. DAILEY: Political.

MR. SUSSMAN: What were the political factors?

MR. DAILEY: We wanted to save as many incumbent Republicans as possible.

* * *

MR. SUSSMAN: This (newspaper) article says further, "Under further questioning from Townsend about input in actual map drawing, Bosma said 'You will have the privilege to offer a minority map. But I will advise you in advance that it will not be accepted.' Is that accurate?"

MR. BOSMA: That's accurate. I might add that I don't make goals for the opposite team.

After a limited floor debate, the conference committee report was introduced for vote in both houses of the General Assembly on April 30, the final day of the 1981 regular session. The Senate adopted the report (Roll Call 673) along party lines, 33-15. The House similarly adopted the report (Roll Call 844) along party lines, 59-40. The Indiana Journal reports comments by Senator Townsend for April 30, 1981 that the Democrats had only 40 hours to review the districting of more than 4,000 precincts. The Governor signed the bill into law on May 5, 1981. The matter was then settled until the following year when, during the 1982 short session, certain revisions were made to add parts of the state to districts which had been wholly omitted in the 1981 legislation.

THE REDISTRICTING PLAN

The result of the General Assembly's work is evident to the Court through a number of exhibits and maps. Fifty

(50) districts were drawn for the Indiana Senate; seventy-seven (77) districts were drawn for the Indiana House. The House districts are comprised of sixty-one (61) one-member districts, nine (9) two-member districts, and seven (7) three-member districts. (See attached Court Exhibits A and B, the House and Senate Districts, respectively, as supplied by the Indiana Legislative Council.)

The districting was not a "nested" plan, that is, the House districts drawn are not at all relevant to the Senate districts. A true "nested" plan would include, for example, two House districts within one Senate district. The districts for each house in the General Assembly were drawn independently of each other, making it at least possible that citizens represented by the same House member might well be represented by different Senate members.

There is no evident pattern to the redistricting plan. No clear policy statements are evident to the Court from either the debate on the bills or the documents presented to the Court. The deposition testimony of the legislative principals involved makes clear that Supreme Court guidelines summarized as "one person-one vote" were carefully followed. The defendants also now state that a policy of "no retrogression" also guided the decisions made by the legislative mapmakers. "No retrogression" was an effort to preserve the constituencies for black members of the General Assembly that existed prior to the 1980 census. The census figures revealed a certain migration of minority citizens from inner city areas in which they had commanded considerable voting strength.

The common denominator in the districting is the precinct. Although township lines have been observed in most instances, township lines also were bisected on occasion.

The population deviations between districts in the House plan was 1.05 percent; the population deviation in the districts of the Senate plan was 1.15 percent.

A. Impact of the Redistricting Plan on Democrats (the Bandemer plaintiffs).

Indiana is historically a "swing" state which has been generous in its support of both Democrats and Republicans, dependent largely on national trends, the parties' candidates for nationwide office, and the major candidates for statewide office. As a consequence, Democrats scored substantial victories in 1974, 1964, and 1958 when up to 56 percent of the state's vote went to Democratic candidates. Similarly, Republicans scored large victories in 1980, 1972, and 1956 (all landslide years for Republican presidential candidates) when up to 58 percent of the state's vote went to Republican candidates. The Court finds these figures to be credible evidence of flux in Hoosier political emotions.

Statistics introduced in the instant case have compelled scrutiny by the Court. The parties have presented voluminous statistical data and argue the figures support their positions in this lawsuit. This Court does not wish to choose which statistician is more credible or less credible. Instead, the Court refers to some basic statistical foundations which appear credible and reliable in making determinations about the impact of the '81-82 redistricting plan on Democratic candidates.

Most significant among these many statistical figures is the fact that in 1982 Democratic candidates for the Indiana House earned 51.9 percent of all votes cast across the state. However, only 43 Democrats were elected to seats. The State argues that it is possible that this disparity is explained by the Republicans fielding better candidates or other factors which make the outcome of such elections sensitive to the interests of the voters and the issues of the day. The Court would readily concede this possibility, but the disparity between the percentage of votes and the number of seats won is, at the very least, a signal that

Democrats may have been unfairly disadvantaged by the redistricting.

In addition, there has been dispute between these parties about what constitutes a competitive race, *i.e.*, an election close enough to be determined by candidate personality and positions rather than party loyalty. The Republicans argue that any race between 40 and 60 percent constitutes a "competitive" race; the Bandemer plaintiffs contend that, given Indiana's history of party-line voting (a fact to which the defendants' expert conceded in his testimony), a 45-55 percentage range is a more apt definition of "competitive" in Indiana politics. The Court would agree that the latter figure is more realistic in light of the facts and political history.

The 1982 legislative elections, which were conducted according to the districting challenged in this lawsuit, yielded the following results:

- In the Indiana House, all 100 seats were up for election. Seventeen candidates ran unopposed. Democratic candidates received 872,430 votes statewide, or about 51.9 percent of the vote. Republican candidates received 808,681 votes statewide, or about 48.1 percent of the vote. Fifty-seven Republican candidates were elected to serve in the Indiana House; forty-three Democrats were elected to the House.
- In the Indiana Senate, 25 seats were up for election. Democratic candidates received 454,849 votes statewide, or about 53.1 percent of the vote. Republican candidates received 402,492 votes, or about 46.9 percent of the vote. Thirteen Democrats and twelve Republicans were elected to Senate seats.

As the defendants' expert testified, such figures can be deceiving. Voter concentrations, particularly of Democrats in urban areas, can make compilations of *total* vote for a

particular party's candidates across the state misleading. A heavy turnout of Democratic voters in a heavily Democratic area of the state can skew these total vote figures. For example, a Democratic candidate who wins by a large percentage in a given district wins one seat, but two Republicans who win by much smaller majorities in other districts have been elected with considerably smaller expenditure of votes. If the votes were totaled for all three races, it is conceivable that Democratic candidates may have earned the most votes, but that two Republican candidates have been elected compared to one Democrat. Thus, this kind of vote analysis presents dangers of misrepresentation. However, the Court believes this kind of analysis to present the precise problem to which the Bandemer plaintiffs refer. In short, the majority party has been able to draw maps which will permit it to win close races in certain districts by "stacking" Democrats into a minority of districts where their strength is overpowering. There is little doubt that a well-programmed computer, full of the most recent election results in Indiana's 4,000-plus precincts, can aid in the drawing of lines advantageous to the party in power. As a result, the figures before the Court, even when looked upon with restraint, would seem to support an argument that there is a built-in bias favoring the majority party, the Republicans, which instituted the reapportionment plan. No party to this lawsuit has attempted to state that the figures have any value as a predictor of future election outcomes, and the Court makes no such reading of the statistics. However, even the suspicion of this kind of built-in bias against the Democrats, represented by these plaintiffs, arouses the Court's concern and urges a closer look at the circumstances surrounding the passage of this reapportionment plan.

B. The Shapes of the Districts as a Factor in the Court's Analysis

The Court acknowledges the historical existence of so-called "gerrymandering" of districts, a device which has been used by both major political parties and which is claimed to have occurred in this case by the Bandemer plaintiffs.

The approach used by the majority party in this instance presents a new twist, however, in that sophisticated computer equipment obviously provided more flexibility to the mapmakers.

There is dispute as to whether parties responsible for the reapportionment plan considered "community of interest" in their line drawing enterprise. Senator Bosma, in his deposition testimony, said that "community of interest" was such a consideration. The results of the reapportionment maps would appear to undercut that assertion. This Court's understanding of "community of interest" would be, generally speaking, the inclusion of citizens in a given legislative district who share a geographic area, with similar concerns and needs to be met by their state legislators. A scrutiny of the maps instituted by the General Assembly discerns a lack of any *consistent* application of "community of interest" principles. For instance, it is difficult to conceive the interests shared by blacks in Washington Township and white suburbanites in Hamilton and Boone counties, or the shared interest of Allen and Noble county farmers with residents of downtown Fort Wayne. The Court, however, acknowledges that some diversity will be unavoidable where urban, suburban and rural interests are in physical proximity and where adherence to "one person, one vote" make such "melting pots" necessary. There are examples in the present maps which call the Court's attention to such phenomena. The best examples of these unusual shapes are in the House plan. (See Court Exhibit A.)

We first examine Marion County to explore this absence of "community of interest" and the existence of unusual shapes in these districts. The 51st House district is heavily Democratic and elected three Democrats to the Indiana House seats in 1982. The remainder of the county, while also populated with areas of less heavy Democratic support, was won by Republican candidates in 1982. These less heavy Democratic pockets have been split by the mapmaker to reduce the influence these voters wield. The urban Democrats who were not included in the 51st District have thus been divided into the 50th District (covering east and northeastern portions of the county), the 52nd District (south and southwest), and the 48th District (west). The shapes are unusual for a number of reasons, notably because of the necessity of adding townships from contiguous counties to preserve the 15-seat Marion County delegation to the Indiana House despite a population decrease.¹ These districts are particularly suspect with respect to compactness. District 48 presents the most grievous example of the political cartographer's handiwork in this case. District 48 forms the letter "C" around the central city of Indianapolis. The district includes portions of the urban southwestside of the city, the airport and suburban area around Ben Davis High School on the west side, and the Meridian Hills area at the northern part of the county. There is simply no conceivable justification for this kind of district, even though the district meets the requirements of "one person, one vote."

There appears to be no consideration of existing political subdivisions in the districting. District 66 is a good

¹As the Bandemer plaintiffs noted, Marion County's population constituted a so-called "perfect" figure from which 14 House seats and 7 Senate seats could have been carved to meet the population goals of "one person, one vote". Instead, the powerful Marion County delegation forced neighboring counties to cede turf to permit a preservation of the multi-member districts which had consistently returned Republicans to the Statehouse.

example of this situation. The district begins in the southwest townships of Bartholomew County, includes ten of the twelve townships in Jackson County, includes one township in Jennings County, goes through a narrow passage by taking in Johnson and Lexington townships in Scott County, then expands into Clark County until reaching the state border at the Ohio River. District 42 fills a narrow portion of the state beginning with northern Vigo County at the southern most point and extends approximately 50 to 55 miles north to include one township (Hickory Grove) of Benton County. Along the way, the district picks up one northwest township of Parke County, splits Fountain County, and includes all of narrow Vermillion County.

The west central portion of the state also provides an example of the precinct being the common denominator in the mapmaker's scheme. For instance, Districts 43 and 44 split Lost Creek Township in Vigo County.

To the south, another strange districting choice is apparent. Examining Districts 45 and 46, it is evident that Sullivan, the county seat of Sullivan County, is severed from all but one of the county's nine townships. Sullivan shares a House district with only one township to the north. The remainder of the townships share a House district with neighboring Knox County.

Allen County, where multi-member House districts are used, bisects Democratic strength in the urban area (the motivations for which are examined below). Moreover, once the Senate district lines are added to maps with House district lines and county lines, the intersection of lines and districts merely amplifies what must be confusion to the citizens of that county.

Therefore, it is apparent to the Court that the shapes of many of the districts, with particular emphasis on the House plan, are often contorted, with little apparent emphasis on "community of interest", do not adhere to any

remote definition of compactness, and likely have resulted in confusion to voters.

C. Motivations for the Districting Plan Adopted in 1981-1982

The principal consideration apparent in the results of the reapportionment legislation and in the testimony of the legislative architects of the plan was adherence to "one person, one vote." It is quite clear that this was an unavoidable constitutional consideration in light of United States Supreme Court decisions. In addition, there is evidence to support the defendants' contention that the concept of "no retrogression", that is, maintaining the black representation in the General Assembly that existed prior to the new districting plan, also was of concern to legislators. As should be clear from the other fact-findings, there was no apparent concern for either "community of interest" or compactness of districts.

Other motivations also are evident, most notably an effort by the majority party to insulate itself from risk of losing its control of the General Assembly. Speaker Dailey and Senator Bosma, as noted earlier, make no apology for this effort. There is no refuting that the Republican majority focused on protecting its incumbents and creating every possible "safe" Republican district possible, and that this was achieved by either "stacking" Democrats in districts where their majority would be overwhelming or by "splitting" any Democratic Party power with district lines, thus giving Republican candidates a built-in edge, even in competitive districts. While not surprising as a part of the "political game", its effect must be viewed and tested with regard to constitutional guidelines.

The defendants have further argued that "proportionality" also was a consideration. This argument insists that black representation under the '81-82 plan equals the proportion of black citizens now living in Indiana. This argument is similar to the "no retrogression"

argument and, furthermore, seems to represent hindsight and chance—an argument asserted after the accidental fact of proportional representation.

D. Use of Multi-Member Districts.

The Bandemer and NAACP plaintiffs allege that the use of multi-member districts in drawing the House maps unconstitutionally impinges upon their franchise rights. In reviewing these contentions, the Court has found that the disadvantaging effect of the plan's multi-member districts falls particularly hard and harsh upon black voters in the state.

It is evident to the Court that blacks in this state for a number of years have had an identifiable and predictable tendency to vote for Democratic candidates and also have a tendency to vote as a bloc. Because blacks comprise 8 percent of the state's population and occupy, for the most part, the urban areas of the state, they also find themselves in multi-member districts under the House plan adopted in '81-82. Of Indiana's total population, 39 percent of its citizens are in multi-member districts. Among blacks, 81.2 percent of the population resides in multi-member districts. An estimated 65 percent of the white population, by comparison, resides in single member districts. In addition, other evidence indicates that only 43 percent of the blacks living in multi-member districts live in a so-called minority/majority district, *i.e.*, they reside in a district where blacks comprise a majority of the voters.

During the legislative process leading to these reapportionment plans, several members of the House were contacted about the continuation of multi-member districts. This was done particularly for those incumbents who represented multi-member districts. In at least one instance, all members representing an existing multi-member district chose to break up that area into single member districts. The legislative leaders agreed to do so where all members representing that district were in

agreement. The other justifications for continuing the multi-member district approach have been discussed. It is obvious that political considerations figured highly in the perpetuation of this sort of districting approach.

Multi-member districts are confined to urban areas, but there is no particular pattern which is applied consistently. Some major cities are included in multi-member districts, others are not. No particular consideration was given to existing political boundaries. The history of multi-member districts in Indiana is sketchy. Multi-member districts have been in use during this century, but it was not until 1972 that areas larger than a county were so apportioned to create a House district. Deviation from this approach is most evident in the '81-82 plan where Marion County representatives convinced legislators to include neighboring townships in other counties in their districts to preserve the 15-person delegation to the House.

The multi-member district approach is particularly effective in "stacking" blacks into large majority districts and fragmenting their population among other districts. An alternative plan was presented to the General Assembly by Representative Crawford which would have eliminated all multi-member districts and created 100 single-member districts. The plan was virtually ignored by the majority party in the legislative proceedings. Among the results of the 1981-82 legislative reapportionment is that 46.6 percent of the populations of the House districts which primarily encompass Marion and Allen Counties, among the state's most populated, are Democrats, or at least have Democratic voting tendencies. Yet, under the plan adopted in 1981-82, and after the 1982 election, 18 Republicans filled the 21 House seats representing those two counties (and those portions of other counties into which the relevant district lines meander). All were part of multi-member districts. Thus, the Republicans enjoy approximately 86 percent of the House seats apportioned to the populations of

Marion and Allen Counties, of which 46.6 percent are identifiable as Democratic voters. The court feels that such a disparity speaks for itself.

COURT'S ANALYSIS AND CONCLUSIONS OF LAW

The Bandemer plaintiffs contend they are entitled to relief under the Equal Protection Clause of the Fourteenth Amendment and provisions of the Indiana Constitution. They challenge the legislature's 1981-82 reapportionment on the grounds that it constitutes political gerrymandering and as such violates the plaintiffs' constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. As such, the plaintiffs' action alleges partisan discrimination under the Fourteenth Amendment. This Court finds that, upon the evidence herein, political gerrymandering did occur and the Bandemer plaintiffs were disadvantaged thereby. Further, the Court finds that the Bandemer plaintiffs are entitled to redress under the Equal Protection Clause of the Fourteenth Amendment.

The NAACP plaintiffs allege that the House and Senate redistricting plans intentionally fragment black population concentrations in violation of the Fourteenth and Fifteenth Amendments and perpetuate the effective dilution of black voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973c (as amended 1982).

In regard to these contentions, the Court has determined that the voting efficacy of the NAACP plaintiffs was impinged upon because of their politics and not because of their race. It is not in dispute that blacks in this state vote overwhelmingly Democratic. Partisan considerations did motivate the Indiana legislature in the 1981-82 redistricting, as the Court has found. The implementations of those considerations had a significantly adverse impact upon black voters, because they characteristically align

themselves to the Democratic party, but not because of their race. Therefore, the Court does not find violations of the Fifteenth Amendment or the Voting Rights Act as argued by the NAACP plaintiffs. Rather, the infirmities which reside in 1981-82 redistricting plan arise under the Fourteenth Amendment's fundamental equal protection guarantee of fair and effective representation. The relief thus ordered below with regard to the Bandemer plaintiffs, as discussed below, also accords to the NAACP plaintiffs that relief to which they are entitled under the facts herein.

The Supreme Court has yet to address directly the constitutional ramifications of a political gerrymander in the context of a state legislative reapportionment. This Court, in so finding a violation of the Fourteenth Amendment, has been persuaded by the analysis of political gerrymandering in Justice Stevens' concurrence in *Karcher v. Daggett*, ___U.S.___, 103 S.Ct. 2653 (1983).

By utilizing the analysis in the *Karcher* concurrence, in conjunction with the Court's well-established standard of proof for invidious discrimination as set forth in *City of Mobile v. Bolden*, 446 U.S. 67, 100 S.Ct. 1490 (1980), this Court finds that the 1981-82 state reapportionment invidiously discriminates against the plaintiffs. The plaintiffs' right to vote, as secured by the Equal Protection Clause, is impinged upon by partisan gerrymandering, which constitutes a violation of the Equal Protection Clause under the facts proven herein.

The constitutionality of state legislative reapportionments is governed by the Equal Protection Clause of the Fourteenth Amendment, as applied in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) and its progeny. As stated by the *Reynolds* Court, "the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any

alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds, supra*, at 561, 562, 84 S.Ct. at 1381.

Reynolds and subsequent cases dealing with state reapportionment have generally arisen out of challenges to the numerical equality of the citizen's right of suffrage. In *Reynolds* the Court enunciated the equal protection test that districts in state reapportionments be "as nearly of equal population as is practicable," *Reynolds, supra*, at 577, 84 S.Ct. at 1390. See *Brown v. Thomson*, ___ U.S. ___, 103 S.Ct. 2690 (1983). Accordingly, the focus of constitutional inquiry has been upon population equality among districts composing an apportionment plan. Deviations from population equality have been the basis in large part for the challenges to state reapportionment plans. Challenges have also been for unconstitutional vote dilution of blacks. See *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272 (1982).

The Bandemer plaintiffs allege that their voting rights as Democrats have been unconstitutionally diluted by the 1981-82 reapportionment. Although no apportionment plan has yet been found unconstitutional because it so discriminated against a political group, the Court has recognized that under the proper facts the Equal Protection Clause accords protection to individuals who are being discriminated against because of their political affiliation, or factors other than race, as each voter is entitled to fair and effective representation. See *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272 (1982); *Gaffney v. Cummings*, 412 U.S. 735, 93 S.Ct. 2321 (1973); *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332 (1973).

Political gerrymandering has been defined as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes," *Karcher* at 2689 (J. Powell dissenting (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 538, 89 S.Ct. 1225, 1232 (1969) (Fortas, J. concurring))). Political

gerrymandering may be effected by "stacking" individuals of a cognizable political affiliation together in one district or by "cracking" or "splitting" the same among several districts. By either method, the ability of the targeted group to elect representatives according to their proportion of the population is diminished. As such, the constitutional impingement lies not in any inequality among voters per district, but rather in the shapes of the districts as they serve to disadvantage a cognizable class of voters. Thus the configuration of the districts is where attention must be focused, rather than upon the population count therein. (See the Court's description of district shapes at pp. 15-19, *supra*, and the Court's *Exhibit A*.) In fact, several Justices have espoused their belief that undue emphasis on numerical equality may permit obvious partisan gerrymandering. *Karcher*, at 2670, 2683, 2688 (Stevens, J. concurring, White, J. dissenting, Powell, J. dissenting, respectively).

The Supreme Court has determined that discriminatory purpose is a required element of a vote-dilution claim under the Equal Protection Clause of the Fourteenth Amendment. In *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490 (1980), black voters challenged an at-large election system of municipal elections. The plaintiffs' action was based in part on the Fourteenth Amendment. The District Court found the system to be unconstitutional thereunder.

The Supreme Court found that a violation of the Fourteenth Amendment had not been established, and in so holding, discussed the level of proof necessary to establish such a claim as racial gerrymandering. "[L]egislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.... To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers.... A

plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial...discrimination...' *Mobile v. Bolden, Id.* at 66, 100 S.Ct. at 1499 (1980). (Citation omitted.) Disproportionate effects alone will not establish a claim of unconstitutional vote dilution.

This Court concludes that the same standard applies where political gerrymandering is alleged. The Court finds that the Bandemer plaintiffs have set forth facts sufficient to prove that the reapportionment plan was conceived to accomplish political discrimination and operated as a purposeful device to do so. (See Court's discussion of 1981-82 reapportionment legislative process, at pp. 6-10, *supra*; and impact of the redistricting plan on the plaintiffs, pp. 11-23, *supra*.) As set forth above, the Court has found that the Bandemer plaintiffs have been disadvantaged by the 1981-82 reapportionment of the Indiana legislature. The effect of the apportionment scheme enacted by the legislature was to dilute the votes of those who are aligned with the Democratic Party, the Bandemer plaintiffs. The Court is thus drawn to the conclusion that in the 1981-82 reapportionment of the Indiana legislative districts, political gerrymandering did occur and as such violated the plaintiffs' rights to equal protection.

The right to vote in a fair and effective manner is a fundamental right. The "Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters." *Mobile, supra*, at 77, 100 S.Ct. at 1505, citing *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999, *Reynolds v. Sims*, 377 U.S. at 576, 84 S.Ct. at 1389. Where political gerrymandering has occurred, this right has been unconstitutionally impinged upon. A scheme designed to insure a predestined outcome does not accord to a vote cast that equality in elective power to which it is guaranteed under the Fourteenth Amendment. Each citizen has a right not only to cast a ballot, but to have his political decision be as meaningful as any other vote. Thus

political gerrymandering is a violation of the Equal Protection Clause because it invidiously discriminates against a cognizable, identifiable group of voters.

The Supreme Court has "recognized that a voter's right to 'have an equally effective voice' in the election of representatives is impaired where representation is not apportioned substantially on a population basis. In such cases, the votes of persons in more populous districts carry less weight than do those of persons in smaller districts." *Mobile*, 446 U.S. at 78, 100 S.Ct. at 1505. The situation is no less egregious when the votes of persons "carry less weight" because they are cast for a candidate of a particular political party.

Political groups themselves do not have an independent constitutional claim to representation. *Mobile*, 446 U.S. at 78, 79, 100 S.Ct. at 1506. That is, the Constitution does not guarantee proportional representation, but the Constitution does prohibit "state action that inhibits an individual's right to vote...", *Mobile*, 446 U.S. 83, 100 S.Ct. 1508 (Stevens, J. concurring), and certainly, apportionment schemes which purposely inhibit or prevent proportional representation cannot be tolerated.

In an action alleging political gerrymandering, as in other gerrymandering situations, the plaintiffs must show a discriminatory purpose in order to prove a violation of the Equal Protection Clause. This Court finds from the evidence that the district lines were drawn with the discriminatory intent to "maximize the voting strength" of the majority Republican Party and "to minimize the strength" of the Democratic Party. (See *Mobile* at 446 U.S. 87, 100 S. Ct. 1510 (Stevens, J. concurring).) The Bandemer plaintiffs have shown that the State has acted with the purpose of impairing a political group's access to the political process, and therefore a violation of the Equal Protection Clause in the form of political gerrymandering has occurred.

The *Karcher* decision dealt with a challenge to congressional reapportionment. However, in his concurrence Justice Stevens expounded upon the indicia of gerrymandering, be it on a federal or state level. This Court finds the analysis contained therein, which outlines a cause of action for gerrymandering, to be acutely applicable to the present cases.

To prove unconstitutional gerrymandering, "plaintiffs must show that they are members of an identifiable political group whose voting strength has been diluted. They must first prove that they belong to a politically salient class, ... one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing district boundaries." *Id.* at 2672 (citation omitted). The Bandemer plaintiffs clearly belong to a politically salient class, those who align themselves with the Democratic Party. Particularly with the computer technology now available, and so utilized by the Republicans in formulating the 1981-2 apportionment plan, the geographical distribution of the Bandemer plaintiffs and the class they represent is ascertainable from the voting records, precinct by precinct, throughout the state. The ability to so determine the distribution of Democratic voters has not been disputed by the defendants.

Second, the plaintiffs "must prove that in the relevant district or districts or in the State as a whole, their proportionate voting influence has been adversely affected by the challenged scheme." *Id.* at 2672. Such a "vote dilution may be demonstrated if a population concentration of group members has been fragmented among districts, or if members of the group have been over concentrated in a single district greatly in excess of the percentage needed to elect a candidate of their choice." *Id.* at 2672, fn. 13. The plaintiffs have provided such evidence, particularly with regard to the House district lines apportioning Marion and Allen counties and other districts throughout the state

referred to in our finding of facts. (See Court's discussion at pp. 12-15, *supra*.)

The third element is that the "plaintiffs must make a *prima facie* showing that raises a rebuttable presumption of discrimination." *Id.* at 2672. Under this element, *prima facie* evidence of gerrymandering can be demonstrated in several ways. One is a showing of numerical inequality, but a violation of numerical equality has not been alleged by the Bandemer plaintiffs. However, the contentions of political gerrymandering and vote dilution which the plaintiffs do raise fall precisely within examples of *prima facie* gerrymandering set forth in the *Karcher* concurrence. Evidence can be in "the shape of the district configuration themselves." *Id.* at 2672. That is, "dramatically irregular shapes may have sufficient probative force to call for an explanation.... Substantial divergences from a mathematical standard of compactness may be symptoms of illegitimate gerrymandering." *Id.* at 2672. The present districting plan is replete with "uncouth" and "bizarre" configurations that beg for some rationale, yet the state has set forth none which justify either the shapes or the concomitant adverse impact upon the plaintiffs. Without some requirement of compactness, no restrictions exist upon the mapmaker to prevent lines which meander in search of partisan support. Further, "[t]o some extent, geographical compactness serves independent values; it facilitates political organization, electoral campaigning, and constituent representation." *Id.* at 2673 (f.n. omitted). Therefore "drastic departures from compactness are a signal that something may be amiss." *Id.* at 2674. The lack of compactness in the present plan is clearly supportive of the plaintiffs' argument that partisan considerations are unconstitutionally reflected in the redistricting lines.

Also,

[E]xtensive deviation from established political boundaries is another possible basis for a *prima facie* showing of gerrymandering. As we wrote in *Reynolds*

v. Sims, "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." 377 U.S. at 579, 84 S.Ct., at 1390.

Id. at 2674.

The reapportionment plan conspicuously ignores traditional political subdivisions, with no concern for any adherence to principles of community interest. (See Court's discussion at pp. 15-19, *supra*.) Repeated examples exist of bizarre district configurations, drawn with no recognition or adherence to political subdivisions such as municipalities and counties. The Court has noted before the configurations of House Districts 45 and 46. District 46 encompasses Owen County, two townships in Clay County, four townships in Vigo County and two townships in Sullivan County. The districting tentacle that meanders into Sullivan County engulfs the City of Sullivan, which is the county seat. As a result, the electorate of the county seat is aggregated along with voters from three other counties, into a district that extends from Sullivan, through Clay and Owen Counties and into Morgan County. Concomitantly, the remaining townships of Sullivan County are in District 45, which is drawn south and contains a majority of the townships in Knox County, but not the City of Vincennes. Such is a prime example of how the reapportionment dissects communities into abstract configurations without common threads of political interest.

The Court finds no justifiable reason as to why the voters in the county seat of Sullivan should be excised from the rest of the county and located in a district which is elongated into Morgan County. The distance from the City of Sullivan to the eastern boundary of District 46 in Morgan County is approximately sixty-five miles. While Indiana is by and large a rural state, it does not have vast expanses of area with sparse population, as is characteristic of some western states. Such distances may be justified there. They

are not in Indiana. In the context of Indiana state representation, the Court does not believe that excessive distances and bizarre configurations are mandated by the geographic distribution of the state's population.

The Court does not intend to deemphasize the infirmities of other districts' shapes by elaborating upon the situation in Districts 45 and 46. Several other districts have been discussed earlier in this opinion. (See Court's discussion at pp. 15-19). District 62 contains five townships in Daviess County, proceeds north to envelop twelve townships in Green County, south again into Martin and Lawrence Counties and stretches to the southeast corner of Orange County. The distance from the northwest to southeast corners of District 62 is approximately seventy miles. District 66 twists and turns south from Bartholomew County, through Jackson County, across the southwest corner of Jennings County, detours over two townships in Scott County and finally halts in Clark County on the shores of the Ohio River. The same contorted description would be appropriate for districts 70 and 73 as well.

The Court finds that such examples of irrational mapmaking are pervasive throughout the apportionment scheme, rather than isolated events. (See attached Exhibit A and, further, House Districts 20, 22, 25 and 48. Again, the list is not meant to be exhaustive.) Such mapmaking divests the apportionment of the principles of community interest which kindle and nourish fair and effective representation.

To behold the House apportionment map is to view a districting scheme that is skewed against responsive political participation at the county level. While township lines are usually observed, the county government is the center of local affairs. If the county is so disregarded, then the voter does not have a convenient focal point upon which to apply his political activities or to observe the rewards of his efforts. Accordingly the potential for voter disillusion and nonparticipation is great, and the fundamental American principle of self-government is threatened.

The Court recognizes that the principle of "one person, one vote" cannot be subsumed by the undue fostering of "community of interest" principles such as compactness, contiguity and adherence to political subdivision lines. However, the evidence of record does not demonstrate that the district lines as they exist are necessary in order that the "one person, one vote" constitutional tenet be preserved.

The inconsistent and unexplained use of multi-member districts further calls for examination by this Court. Multi-member districts are not unconstitutional *per se*, *Whitcomb v. Chavis*, 403 U.S. 124, 158-159 (1970), yet their effect of "minimiz[ing] the voting strengths of minority groups by permitting the political majority to elect *all* representatives of the district..." has been recognized by the Court. *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 3275 (1982). Further, multi-member districts do "violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial...discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Id.* In light of the recent decisions of the Supreme Court discussed above, this Court determines that this proscription applies equally as well to other distinct and identifiable minorities, whether they be political, ethnic, or economic.

The majority party through the use of multi-member districts stacked or split concentrations of black Democratic voters so that their elective power would be minimized. (See Court's discussion of multi-member districts at pp. 20-23, *supra*.) This intentional employment of multi-member districts, with their predictable disadvantaging effect upon Democratic voters, is unconstitutional when viewed with the other examples of discriminatory purpose found by this Court.

Prima facie evidence may also be shown by a lack of fairness in the procedure surrounding the legislature's enactment of the district lines.

A procedural standard, although obviously less precise, may also be enlightening. If the process for formulating and adopting a plan excluded divergent viewpoints, openly reflected the use of partisan criteria, and provided no explanation of the reasons for selecting one plan over another, it would seem appropriate to conclude that an adversely affected plaintiff group is entitled to have the majority explain its action. On the other hand, if neutral decisionmakers developed the plan on the basis of neutral criteria, if there was an adequate opportunity for the presentation and consideration of differing points of view, and if the guidelines used in selecting a plan were explained, a strong presumption of validity should attach to whatever plan such a process produced.

Karcher, at 2674-75.

The challenged plan was the product of the majority party's application of computer technology to the task of mapmaking. The minority party was wholly excluded from the mapmaking process which culminated in the present district lines. Only in the final hours of the legislative session were the details of the plan revealed to the members of the minority party. Minuscule time was available for the plan to be scrutinized, and its import debated. Rather, the minority party was intentionally precluded from participating in the process by which the present plan was drawn up. (See Court's discussion at pp. 6-10, *supra*.) Clearly, such a procedure is in degradation of the constitutional norm of fair, effective and equal representation.

Thus, this Court finds that the *Bandemer* plaintiffs have made a *prima facie* showing of discriminatory political gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment.

The burden is then upon the State to demonstrate that notwithstanding the indicia of gerrymander discussed

above, the present "plan as a whole embodies acceptable, neutral objectives . . .", *Id.* at 2675, which negate a finding of constitutional invalidity.

In order to overcome a prima facie case of invalidity, the State may adduce "legitimate considerations incident to the effectuation of a rational state policy," *Reynolds v. Sims*, supra, 377 U.S., at 579, 84 S.Ct., at 1391, and may also

show with some specificity that a particular objective requires the specific deviations in its plan, rather than simply relying on general assertions. The showing . . . is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. *Ante*, at 2663-2664.

Id. at 2675.

The State in this case has been unable to show that the 1981-82 reapportionment is supported by adequate neutral criteria which justifies the adverse impact which the plan has upon the voting rights of the Bandemer plaintiffs. The present plan is without a "rational basis in neutral criteria." *Id.* at 2678.

The Court hereby finds that the Bandemer plaintiffs have been intentionally discriminated against by the Indiana legislature's 1981-82 reapportionment of state legislative districts. The Court makes this finding upon a determination that the Bandemer plaintiffs have shown both discriminatory intent in the enactment of the 1981-82 reapportionment plan and the discriminatory impact of the elective process which has occurred thereunder.

The Court also holds that the remedy ordered below renders moot the Bandemer plaintiffs' allegations that the

1981-82 reapportionment violates Indiana's state constitution.

ORDER

Having entered the above findings of fact and conclusions of law, this Court:

1. DECLARES and DECREES that the 1981 Indiana House and Senate legislative reapportionment acts and the 1982 amendments thereto are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

2. ORDERS that this decision has prospective application only and this Court hereby recognizes that the November 6, 1984 election was legally held and, further, that the 1985 session of the General Assembly and its members are duly constituted under the law.

3. ORDERS that the state officers responsible for implementing the election laws and holding elections thereunder are hereby ENJOINED from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto subsequent to the November 6, 1984 general elections.

4. ORDERS that the 1985 session of the Indiana General Assembly is hereby afforded the opportunity to enact legislation to redistrict the State and reapportion the legislative seats in the General Assembly in accordance with federal constitutional requirements and in compliance with this opinion.

5. ORDERS that this Court shall have and retain continuing jurisdiction over the present cases and should the 1985 Indiana General Assembly not enact a reapportionment law which is in compliance with federal constitutional requirements and the Orders of this Court, then this Court shall further act as it is deemed necessary and appropriate under the circumstances then presented to the Court.

PELL, Senior Circuit Judge, concurring in part, dissenting in part. I concur in the majority's conclusion that defendants, by designing and implementing the present redistricting plan, did not discriminate against NAACP plaintiffs in violation of either the Fifteenth Amendment or section 2 of the Voting Rights Act. I dissent, however, from the majority's decision that defendants violated the Equal Protection Clause of the Fourteenth Amendment by drawing a redistricting plan that diluted Bandemer plaintiffs' and NAACP plaintiffs' voting strength as Democrats. Because I dissent from the majority's determination that defendants' plan constituted an unconstitutional political gerrymander under the Fourteenth Amendment, I must address Bandemer plaintiffs' claims that the plan violated article II, section 1, article I, section 23, and article IV, section 6 of the Indiana Constitution. In my opinion, Bandemer plaintiffs also have failed to prove that defendants violated the Indiana Constitution by adopting this redistricting plan.

I. NAACP Plaintiffs' Claims

A. Fourteenth and Fifteenth Amendments

I concur in the majority's conclusion that NAACP plaintiffs have failed to prove that defendants, by enacting the present redistricting plan, discriminated against plaintiffs on account of their race. NAACP plaintiffs attack the redistricting plan as unconstitutional under the Fourteenth Amendment, the Fifteenth Amendment, and section 2 of the Voting Rights Act. To demonstrate unconstitutional race discrimination under the Fourteenth and Fifteenth Amendments, plaintiffs must prove that defendants intended to discriminate against them on the basis of race. *Mobile v. Bolden*, 446 U.S. 55, 62-63, 66 (1980) (plurality opinion). See also *Gomillion v. Lightfoot*, 364 U.S. 339, 346-47 (1960) (Fifteenth Amendment challenge to redrawing boundaries of Tuskegee Alabama).

I agree with the majority that the evidence in this case establishes that defendants did not intend to discriminate against plaintiffs on account of their race in drawing the redistricting plan. For this reason, NAACP plaintiffs cannot prove Fourteenth or Fifteenth Amendment claims for race discrimination. If anything, defendants attempted, through their redistricting plan, to maximize Republican voting strength and to contain Democratic voting strength. NAACP plaintiffs, therefore, may argue that defendants discriminated against them on account of their political affiliation in violation of the Equal Protection Clause of the Fourteenth Amendment. I will address that contention in Part II of this opinion.

B. Section 2 of the Voting Rights Act

Although I agree with the majority that NAACP plaintiffs have failed to establish that defendants violated section 2 of the Voting Rights Act, I disagree with the reasoning employed by the majority. Despite the fact that the majority found that the redistricting plan "had a significantly adverse impact upon black voters," the majority held that defendants did not violate section 2 because they were motivated by partisan considerations, not racial animus. Unlike claims based upon the Fourteenth and Fifteenth Amendments, a claim based section 2 does not hinge only upon the presence of discriminatory intent. For that reason, a court should not dispose of a section 2 claim simply because it finds no Fourteenth or Fifteenth Amendment violations.

In 1982, Congress amended section 2 of the Voting Rights Act to eliminate the necessity of establishing discriminatory intent to prove a violation of that section. 42 U.S.C. §1973 (1982). To prove a violation under section 2 as amended, plaintiffs must demonstrate either that defendants intended to discriminate against them or that "the [challenged] structure or practice results in a dilution of minority voting power." *Major v. Treen*, 574 F. Supp.

325, 350 (E.D. La. 1983) (emphasis in original). See also *Ketchum v. Byrne*, 740 F.2d 1398, 1403 1404 (7th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3343 (U.S. Nov. 6, 1984) (No. 84-627). To determine whether plaintiffs have suffered vote dilution under the redistricting plan, the court should examine "the totality of the circumstances." 42 U.S.C. §1973(b)(1982).

In its report accompanying the 1982 amendments, the Senate Judiciary Committee set forth seven factors that a court should consider to decide whether defendants have violated section 2. S. Rep. No. 417, 97th Cong., 2d Sess. 2 reprinted in 1982 U.S. Code Cong. & Ad. News 206-07. The application of these factors to the facts in this case supports defendants' position that they did not violate section 2 by adopting the redistricting plan. According to the Report, the court should first consider "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Id.* While plaintiffs correctly pointed out that the state historically has discriminated against blacks in areas of public accommodation, education, and housing, they do not offer evidence to show that blacks suffered discrimination in voting matters.

Second, the court should examine whether, if at all, racial polarization has tainted the voting in Indiana elections. The United States Supreme Court has acknowledged the importance of this factor: "Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without block voting the minority candidates would not lose elections solely because of their race." *Rogers v. Lodge*, 450 U.S. 613, 623 (1982). As defendants emphasize in their briefs, no evidence exists to demonstrate that racial polarization has marred Indiana elections. In fact, in 1982, voters from white-majority House districts elected two black

candidates to the Indiana House. Additionally, in the same election, voters from a black-majority district elected a white candidate to the House.

The court should examine as a third possible indication of vote dilution "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance that opportunity for discrimination against the minority group." S. Rep. No. 417. Plaintiffs have not demonstrated the existence of any of these enumerated devices that could minimize black voting strength. Nonetheless, plaintiffs challenge defendants' retention of multi-member districts within the redistricting plan as racially discriminatory. The majority stated that defendants' use of multi-member districts adversely affected black voters in Indiana, emphasizing the fact that, while only 39% of the total population resided in multi-member districts, 81.2% of the black population resided in multi-member districts. Addressing this comparison, defendants' expert, Dr. Bernard Grofman, pointed out that

[t]he proportion of blacks in multi-member districts is, in and of itself, no indication of anything. The relevant question is what proportion of the districts are majority black districts in the relevant geographic areas of the state, as compared to the proportions of blacks in those areas of the state.

Comparing the proportion of black-majority multi-member districts with the percentage of blacks living in those districts, I find that defendants did not violate section 2 by including multi-member districts within the redistricting plan.

Plaintiffs challenge defendants' use of multi-member districts in Allen and Marion Counties, in particular, as discriminatory against blacks. In Allen County, which defendants divided into two three-member districts, blacks

comprise approximately 8% of the population. Assuming voting along racial lines, the black population's inability to elect any Representatives in Allen County does not demonstrate vote dilution. Even if blacks were entitled to proportional representation, *but see Jones v. City of Lubbock*, 727 F.2d 364, 384 (5th Cir. 1984); *Terrazas v. Clements*, 581 F. Supp. 1329, 1356 (N.D. Tex. 1984), because they comprise only 8% of the population, they would not be entitled to even one of the six seats in Allen County.

Similarly, defendants have not diluted black voting strength in Marion County through the adoption of the five three-member districts that compose the county. Blacks constitute approximately 19% of the population in Marion County. The present redistricting plan enables blacks to elect three Representatives by creating one three-member district with a 61.2% black population.¹ Thus, blacks are able to elect 20% of the Marion County Representatives. By retaining multi-member districts in Marion County, defendants have not diluted the black voting strength, but have, in fact, guaranteed blacks slightly greater than proportional representation.

The fact that blacks possess near proportional representation in Lake County also supports defendants' position that they have not violated section 2. According to plaintiffs' figures, blacks constitute 24% of the population in Lake County. Under the present plan, blacks constitute a majority in District 14, a two-member district. If defendants had drawn a plan that permitted blacks to elect three Representatives from Lake County, blacks would have been able to capture 25% of the Lake County seats.

¹In *Ketchum v. Byrne*, the Seventh Circuit noted that "minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice." 740 F.2d at 1413. The fact that, in 1982, two of the three Representatives elected to the House from the black-majority district were black indicates that blacks possessed considerable voting strength in that district.

Defendants' failure to accord blacks this slight overrepresentation can be explained by the position of Lake County within the seven districts that encompass it. Only five of the districts are composed entirely of Lake County residents. In the remaining two districts, Lake County residents make up only small portions of those districts. More particularly, in District 10, a two-member district, blacks constitute only .3% of the total population. Similarly, in District 16, a single-member district, blacks constitute only .1% of the total population. Under these circumstances, the black population's ability to elect approximately 17% of the Representatives from all the districts that include Lake County leads me to conclude that defendants have not diluted black voting strength in Lake County.

A court should measure vote dilution by analyzing the effects of redistricting in those areas that contain majorities of the minority population. According to a recent case that addressed the issue of vote dilution under section 2 of the Voting Rights Act:

the raw power of such an aggregation 'to elect' provides a clear measure of its voting strength, hence a fair and workable standard by which to measure dilution of that strength. Short of that level, there is no such principled basis for gauging voting strength, hence dilution of that strength.

Gingles v. Edmisten, 590 F. Supp. 345, 381 (E.D.N.C. 1984). Thus, the black community's inability to exercise effective voting power in those areas in which they comprise voting majorities may indicate vote dilution. In this case, however, a comparison of the percentage of blacks with the number of black majority districts in Marion and Lake Counties demonstrates that defendants have not diluted the black vote through the redistricting plan.

The majority asserts that defendants' use of multi-member districts is "particularly effective in 'stacking' blacks into large majority districts and fragmenting their

population among other districts." I disagree with this conclusion. In Marion County, defendants have drawn District 51 to contain a 61.2% black population. To ensure effective black voting power, defendants had to construct that district to include at least a majority of the black population, and perhaps a super-majority. See *Ketchum*, 740 F.2d at 1413. Even if defendants had placed all of the other blacks into one district, they could not have constructed another black-majority district. Under these circumstances, defendants did not stack black votes in Marion County.

Similarly, I cannot find that defendants "packed" the black vote in Lake County, the other county containing a black-majority district. If defendants had drawn District 14 to contain a 51% black majority, rather than the 69.9% majority that exists in that district under the plan, defendants conceivably could have placed the rest of the black population in the remaining districts in such a way as to create another black majority district. But see *Major v. Treen*, 574 F. Supp. 325, 354 (E.D. La. 1983) ("[W]e are not unmindful of the legitimate debate among academics and courts about the relative merits of concentrating a minority population within one district or dividing that population into two or more districts so that it exerts a substantial influence in each."). Undoubtedly, because seven districts compose Lake County, and because Lake County houses a total population of over one-half million people, defendants would have been hard-pressed to construct another majority district while still making the districts compact and contiguous. Additionally, as discussed previously, the present plan ensures near proportional representation for the black community in Lake County. Defendants should not be faulted for designing a plan that should guarantee that two representatives will be elected from a black-majority district; if defendants had drawn even one more black-majority district, they would have enabled blacks to wield voting strength greater than their percentage within

the community would suggest. Certainly, a court should not obligate legislators to overrepresent the voting strength of a particular minority within the community. See *Gingles v. Edmisten*, 590 F. Supp. 345, 382 (E.D.N.C. 1984).

I cannot agree, either, with the majority's assertion that defendants used multi-member districts to fragment black voting strength. In Lake County, of the 8% to 9% black population that exists outside District 14, defendants have arranged it among the remaining districts so that one district contains a 30.6% black population and another contains a 13.3% black population. These figures do not suggest that fragmentation of the black vote exists in Lake County. Similarly, in Marion County, of the 8% to 9% black population that exists outside District 51, defendants have constructed one of the remaining four districts to contain a 21.6% black population. Again, defendants have not fragmented the black vote among the districts in Marion County.

Plaintiffs also have failed to demonstrate that any of the final four factors listed in the Senate Report indicates that defendants violated Section 2 by adopting the redistricting plan. Plaintiffs have not proven that blacks have been denied access to the candidate slating process, S. Rep. No. 417; rather, defendants have offered evidence to show that blacks hold positions of leadership within both major political parties. Additionally, plaintiffs have failed to prove that blacks "bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Id.* To the contrary, defendants have shown that blacks involve themselves both within the parties' structures and with the elected government. Also, plaintiffs have tendered no evidence to suggest that Indiana elections have been marked by "overt or subtle racial appeals." *Id.* Lastly, defendants have shown that blacks "have been elected to public office" in Indiana, *Id.*; in

fact, more blacks now hold seats in the Indiana General Assembly than before the adoption of the redistricting plan.

Analyzing the factors set out in the Senate Judiciary Committee's Report, I find that plaintiffs have failed to prove that defendants diluted the black voting strength in Indiana. Furthermore, defendants have established that the redistricting plan resulted in no "retrogression" of the black vote. As the Seventh Circuit stated in *Ketchum v. Byrne*, "'Retrogression' may be defined as a decrease in the new districting plan or other voting scheme from the previous plan or scheme in the absolute number of Representatives which a minority group has a fair chance to elect." 740 F.2d at 1402 n.2. For purposes of this case, retrogression would occur if defendants reduced the number of black majority districts that exist under the present redistricting plan from the number of black majority districts that existed under the previous redistricting plan. Defendants preserved both the two black-majority Senate districts and the two black-majority House districts in their redistricting plan. Thus, defendants' plan did not cause any retrogression of the black vote.

In conclusion, I agree with the majority's determination that defendants did not violate Section 2 of the Voting Rights Act by adopting the present redistricting plan. As the majority notes, plaintiffs have failed to prove that defendants intended to discriminate against them on account of their race. Plaintiffs also have failed to establish that the redistricting plan resulted in a dilution of their voting strength.

II. Bandemer Plaintiffs' Claims

A. Political Gerrymandering under the Equal Protection Clause

The Supreme Court of the United States never has addressed directly the justiciability of a political gerrymandering claim. Nonetheless, five Justices have expressed a willingness to analyze such claims under the Equal Protection Clause of the Fourteenth Amendment. *Karcher v. Daggett*, 103 S.Ct. 2653, 2667, 2683 (1983) (Stevens, J., concurring), (White, J., dissenting, joined by Burger, C.J., Powell, J., and Rehnquist, J.). Because I believe that the facts of this case do not demonstrate a political gerrymander, I do not reach the constitutional question whether a cause of action for political gerrymandering exists under the Equal Protection Clause.

According to Justice Stevens, "political gerrymandering is one species of 'vote dilution' that is proscribed by the Equal Protection Clause." 103 S.Ct. at 2667 (Stevens, J., concurring). To shift the burden of proof to defendants to justify the redistricting plan, plaintiffs first must prove that the plan diminishes the voting strength of an identifiable political group within the state.² *Id.* at 2672 (Stevens, J., concurring). Specifically, plaintiffs

must first prove that they belong to a politically salient class.... Second, they must prove that in the relevant district or districts or in the State as a whole, their proportionate voting influence has been adversely affected by the challenged scheme. Third, plaintiffs

²Although the four dissenters do not delineate the framework within which they would analyze a political gerrymandering claim, Justice Powell intimates that he would require greater proof than minimization of voting strength to establish a political gerrymandering claim. According to Justice Powell, a redistricting plan rises to the level of an unconstitutional gerrymander only if its "purpose and effect [are] substantially [to] disenfranchis[e] identifiable groups of voters." 103 S.Ct. 2689 (Powell, J., dissenting) (emphasis added).

must make a prima facie showing that raises a rebuttable presumption of discrimination.

Id. (Stevens, J., concurring). Defendants must justify the adoption of the redistricting plan as serving "neutral, legitimate interests" of the state only if the plaintiffs first can prove the existence of the three elements that Justice Stevens sets forth.

Plaintiffs have failed to prove that this redistricting plan constitutes an unconstitutional gerrymander because they have failed to prove that the plan has diluted their voting strength as Democrats. As the majority points out, plaintiffs have offered statistical data that, according to plaintiffs, proves that their voting strength has minimized. Of this data, the majority emphasizes two numerical comparisons to prove vote dilution. First, plaintiffs point out that, although Democratic candidates for the Indiana House received 51.9% of the vote statewide in 1982, only 43 Democrats were elected to the available 100 seats. Second, plaintiffs point out that although Democratic candidates for the Indiana Senate received 53.1% of the vote statewide, only 13 Democrats were elected to the available 25 seats.³

Unlike the majority, which finds that these figures "signal" Democratic vote dilution, I find that a comparison between the percentage of Democratic votes cast statewide for legislative candidates and the number of seats actually won, standing alone, fails to prove vote dilution. According to authorities that Justice Stevens cited approvingly in *Karcher*, 103 S.Ct. 2672 n.13,

This method of identifying gerrymandering . . . has major flaws . . . [T]he approach fails to account for the fact that the difference between the percentage of votes and number of seats captured may in fact be the

³As these numbers indicate, the percentage of seats actually won by the Democrats in the Senate is 52%, approximately the number to which they were entitled under plaintiffs' theory.

result of natural advantages—the inordinate concentration of partisans in one place—rather than any deliberate partisan districting scheme.

Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Minn. L. Rev. 1121, 1127 (1978). To measure the pure voting strength of a particular party within the state, these authors suggest isolating "typical" statewide races, those concerning "relatively invisible offices," and determining the percentage of votes cast for each candidate in these races. *Id.* at 1131. These "typical" races more accurately reflect partisan voting strength because their outcome depends, more often than not, on straight party affiliation rather than on the personalities of the particular candidates. *Id.*

Comparing the number of seats gained by the Democrats in the Senate and House elections with the base voting strength of the Democrats statewide, I find that plaintiffs have not demonstrated that they have suffered vote dilution under the redistricting plan. To minimize the controversy over which typical race to use, the authors suggest adopting "an average of several statewide partisan races from recent elections." *Id.* In 1982, in the race for State Auditor, the Democratic candidate received 50.8% of the vote. In the election for Clerk of the Supreme Court and Court of Appeals, the Democratic candidate received 48.7% of the vote. In 1980 the Democratic candidate for the office of Reporter of the Supreme Court and Court of Appeals won 43.9% of the vote.⁴ Averaging the 1980 results with the average of the 1982 races yields 46.8% as the measure of the Democratic voting strength statewide in Indiana.

Under a comparison of the Democratic voting strength

⁴That this election occurred under a former redistricting plan does not affect its relevance to this calculation. The manner in which a state is districted has no bearing on the way in which votes are cast in a statewide election.

statewide and the percentage of Democratic seats captured in the House and Senate, plaintiffs have failed to demonstrate vote dilution. Although the Democrats won fewer House seats than the base voting strength suggested, they won considerably more seats in the Senate. Compared with a base percentage of 46.8%, the Democrats won 43% of the House seats in 1982. In the Senate elections, however, they won 52% of the seats. Thus, even if the purpose behind the plan was to favor the Republicans, the result of the plan was to advantage and disadvantage both parties equally under the plan.

Most likely, under these circumstances, factors other than political gerrymandering cause the House and Senate race results to be skewed in relation to the base Democratic voting strength statewide. The personality of the particular candidates and the specific political issues of the day may explain the small disparity between percentages. Certainly, the personality of a candidate for the Indiana House or Senate bears more heavily on the outcome than does the personality of a candidate for a relatively invisible office. In fact, Bandemer plaintiffs, in their reply brief, cited instances where both Democratic and Republican candidates ran ahead of the base vote and overcame the political complexion of their districts. Also, the heavy concentration of Democratic voters in urban areas may account for the discrepancy between the base vote and the seats won in the House elections. In these districts, any Democratic votes in excess of the number needed to elect the candidate will be politically ineffectual. Nonetheless, these votes will be influential in the statewide races from which the Democratic base vote derives. Under the facts of this case, I disagree with the majority's conclusion that plaintiffs have demonstrated unconstitutional political gerrymandering. I would hold that plaintiffs have failed to satisfy the heavy burden of proving vote dilution. *Karcher*, 103 S.Ct. at 2672 (Stevens, J., concurring) ("[T]his is a burden that plaintiffs can meet in relatively few cases.").

The presence of multi-member districts in the redistricting plan does not convert a legitimate plan into an unconstitutional gerrymander. The Supreme Court has noted frequently that multi-member districts are not *per se* unconstitutional. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *Chapman v. Meier*, 420 U.S. 1, 15 (1975); *White v. Regester*, 412 U.S. 755, 765-66 (1973); *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). In fact, single-member districts may be drawn to discriminate against an identifiable political group just as easily as multi-member districts.

According to the Supreme Court, to prove that multi-member districts deprive an identifiable political group of equal protection:

[T]here must be more evidence than a simple disproportionality between the voting potential and the legislative seats won by a racial or political group. There must be evidence that the group has been denied access to the political process equal to the access of other groups.

Chapman, 420 U.S. at 17. Thus, the fact that Democrats gained only 20% of the House seats in Marion County in 1982 does not prove that defendants unconstitutionally employed multi-member districts in Marion County. In fact, defendants have offered into evidence the certified election returns for Marion County for the State Auditor's race to demonstrate that the base Democratic voting strength in Marion County was considerably less than their strength statewide.⁵

The Supreme Court has enumerated three factors as demonstrative of a denial of access to the political process. First, the court should determine the predominance of multi-member districts within the redistricting scheme.

⁵In Marion County, the Democratic candidate for State Auditor received only 39% of the vote in 1982.

Here, of a total of seventy-seven House districts, the legislature has drawn only nine two-member districts and seven three-member districts. The fact that 20% of the districts are multi-member and that 39% of the Representatives come from these districts does not demonstrate that "multi-member districts compose a large part of the legislature." *Id.* Second, the presence of multi-member districts within both the House and the Senate plans may indicate that the multi-member districts are designed to deny a particular political group access to the political process. *Id.* Here, following past practice, the Senate plan contains no multi-member districts. Third, the court should consider whether the plan allows candidates to run from the same subdivisions of a particular district or whether it imposes some type of residency requirement. *Id.* Neither party has offered any evidence that bears on this issue.

According to the majority, the redistricting plan unconstitutionally dilutes Democratic voting strength because, among other things, the multi-member districts stack Democratic voters. In other words, the majority finds that Democrats "have been overconcentrated in single district[s] greatly in excess of the percentage needed to elect candidate[s] of their choice." *Karcher*, 103 S.Ct. at 2672 n.13 (Stevens, J., concurring). If defendants can be faulted for overconcentrating Democrats in multi-member districts, they can be faulted equally for stacking Republicans in single member districts. In the 1982 House elections, Republicans won twenty-seven contested elections in single-member districts. Of these twenty-seven elections, Republicans won two races with over 65% of the vote, eight races with over 60% of the vote, and twelve races with over 55% of the vote. Certainly, these statistics indicate that defendants placed Republicans in single-member districts in excess of the pure majority needed to exercise effective voting strength.

Defendants did not deny equal protection to Democrats

by retaining multi-member districts within the redistricting plan, but they demonstrated a willingness to convert multi-member districts into single-member districts. Under the present redistricting plan, there are four fewer two-member districts than under the previous plan. According to defendants, the legislators changed multi-member districts into single-member districts in those districts in which all the Representatives requested such a change. This fact, coupled with the absence of vote dilution either within the multi-member districts themselves or within the state as a whole, demonstrates that defendants have not violated plaintiffs' equal protection rights by retaining multi-member districts in the House redistricting plan.

Defendants adhered to "neutral, legitimate interests" in enacting the present redistricting plan. *Karcher*, 103 S.Ct. at 2670 (Stevens, J., concurring). They adhered to the "one-man one-vote" principle contained in Article I, Section 2 of the United States Constitution by formulating a House plan with a population deviation of only 1.05% and a Senate plan with a population deviation of 1.33%. These minor deviations clearly pass muster under Article I, Section 2. *Brown v. Thomson*, 103 S.Ct. 2690, 2696 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations."). In addition to avoiding dilution of the Democratic vote, defendants prevented any retrogression in the black voting strength in Indiana by maintaining all districts which had been black-majority districts under the former plan. Finally, by adopting the plan, defendants advanced subsidiary objectives that the Supreme Court has sanctioned as permissible state interests. First, defendants protected incumbents by drawing a plan which avoided placing them in the same district. *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966). See also *Karcher*, 103 S.Ct. at 2663. Second, defendants preserved the integrity of political

subdivisions within the redistricting plan, which also constitutes a legitimate state interest. *Mahan v. Howell*, 410 U.S. 315, 328 (1973), *modified*, 411 U.S. 922. See also *Karcher*, 103 S.Ct. at 2663. In this plan, as the majority points out, defendants preserved township lines in most cases.

Although the Supreme Court has recognized that the Constitution places limits upon the legislature's freedom to enact any redistricting plan, the Court has emphasized that redistricting remains essentially a political task. *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). See also *Karcher*, 103 S.Ct. at 2671-72 (Stevens, J., concurring); *Id.* at 2689 (Powell, J., dissenting). As the Supreme Court stated in *Gaffney*, "From the very outset, we recognized that the apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' *Burns v. Richardson*, 384 U.S. at 92, is primarily a political and legislative process." 412 U.S. at 749. In his concurrence in *Karcher*, Justice Stevens recognized that the determination whether a redistricting plan constitutes political gerrymandering must turn primarily upon the actual effect of the plan and not upon the intent of the legislators:

I would not condemn a legislature's districting plan in the absence of discriminatory impact simply because its proponents were motivated, in part, by partisanship or group animus. Legislators are, after all, politicians; it is unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting.

Karcher, 103 S.Ct. at 2671-72 (Stevens, J., concurring). In this case, because Bandemer plaintiffs have failed to prove that, as Democrats, they suffered any actual vote dilution under the redistricting plan, I find that defendants have not violated the Equal Protection Clause of the Fourteenth Amendment. Under these circumstances, the judiciary should not be concerned with whether another conceivable

plan might maximize a group's voting strength. Rather, in cases such as this, the court should defer to the legislature and affirm its constitutional redistricting plan. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (White, J., announcing the judgment of the court in an opinion joined by Stewart, J.) ("[R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt.").

B. Political Gerrymandering under the Indiana Constitution

Plaintiffs' inability to prove vote dilution under the redistricting plan also disposes of their claims under Article II, Section 1 and Article I, Section 23 of the Indiana Constitution. Article II, Section 1 provides that "All elections shall be free and equal." According to the Indiana Supreme Court, this provision means that "the vote of every elector is equal in its influence upon the result to the vote of every other elector." *Blue v. State ex rel. Brown*, 206 Ind. 98, 114, 188 N.E. 583, 589 (1934). *Accord State Election Board v. Bartolomei*, 434 N.E.2d 74, 78 (Ind. 1982); *Oviatt v. Behme*, 238 Ind. 69, 75, 147 N.E.2d 897, 900-901 (1958). Because defendants have maintained population equality between districts and have not diluted the Democratic voting strength, they have complied with Article II, Section 1 of the Indiana Constitution.

Article I, Section 23 provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." This equal protection clause of the Indiana Constitution protects the same rights as the federal Equal Protection Clause. *Reilly v. Robertson*, 266 Ind. 29, 37, 360 N.E.2d 171, 175 (1977), *cert. denied*, 434 U.S. 825; *Haas v. South Bend Community School Corp.*, 259 Ind. 515, 526, 289 N.E.2d 495, 501 (1972). Naturally, as with the federal Constitution, the Indiana Constitution does not entitle every voter to the representative of his or her

choice. Addressing this issue, the United States Supreme Court stated:

[T]ypical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it, one candidate wins, the others lose. . . . [A]rguably [the losing candidates' supporters] have been denied equal protection of the laws since they have no legislative voice of their own. . . . But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year.

Whitcomb v. Chavis, 403 U.S. 124, 153 (1971). Rather, the equal protection clause of the Indiana Constitution, like the Fourteenth Amendment of the federal Constitution, guarantees to each voter the right not to have his vote diluted under a redistricting plan. Defendants have not violated Article I, Section 23 of the Indiana Constitution in this case.

Bandemer plaintiffs challenge the constitutionality of the redistricting plan on one additional ground. They argue that the plan violates Article IV, Section 6 of the Indiana Constitution, which states: "A Senatorial or Representative District, where more than one county shall constitute a district, shall be composed of contiguous counties; and no county, for Senatorial apportionment, shall ever be divided."⁶ The redistricting plan satisfies the first clause mandating that counties be contiguous in districts composed of more than one county. Concededly, the redistricting plan violates the second clause prohibiting a division of counties within the Senate redistricting plan. Nonetheless, the legislators presumably could not satisfy this clause and comport with the Supreme Court's

⁶1982 Ind. Acts 232, §4, as concurred in by 1984 Ind. Acts 219, §3, repeals this section. This repeal was passed by the voters at the November 1984 general election.

requirement of substantial population equality within districts. After all, the legislators sought to apportion Indiana's 92 counties into only 50 districts, representing the 50 seats in the Indiana Senate. To accomplish this apportionment while still complying with the one-man one-vote requirement, the legislature inescapably divided counties. In *Whitcomb v. Chavis*, the United States Supreme Court recognized the unavailability of a conflict between Article IV, Section 6 of the Indiana Constitution and Article I, Section 2 of the United States Constitution. 403 U.S. 125, 162 n.42 (plurality opinion). The Court affirmed a district court's redistricting plan for Indiana that split the counties 90 times. *Id*

Although the redistricting plan may contravene the literal meaning of Article IV, Section 6, it does not undermine the original purpose behind the second clause of Section 6. This clause, according to the Indiana Supreme Court, was enacted to promote proportional popular representation. *Denny v. State ex rel. Basler*, 144 Ind. 503, 519, 42 N.E. 929, 934 (1895). The present one-man one-vote requirement, however, advances that aim to an even greater degree. Thus, I conclude that defendants' Senate redistricting plan, which splits counties seventy-three times, does not violate Article IV, Section 6 of the Indiana Constitution because it embodies an attempt to apportion 92 counties into 50 districts while still retaining population equality among districts.

III. Conclusion

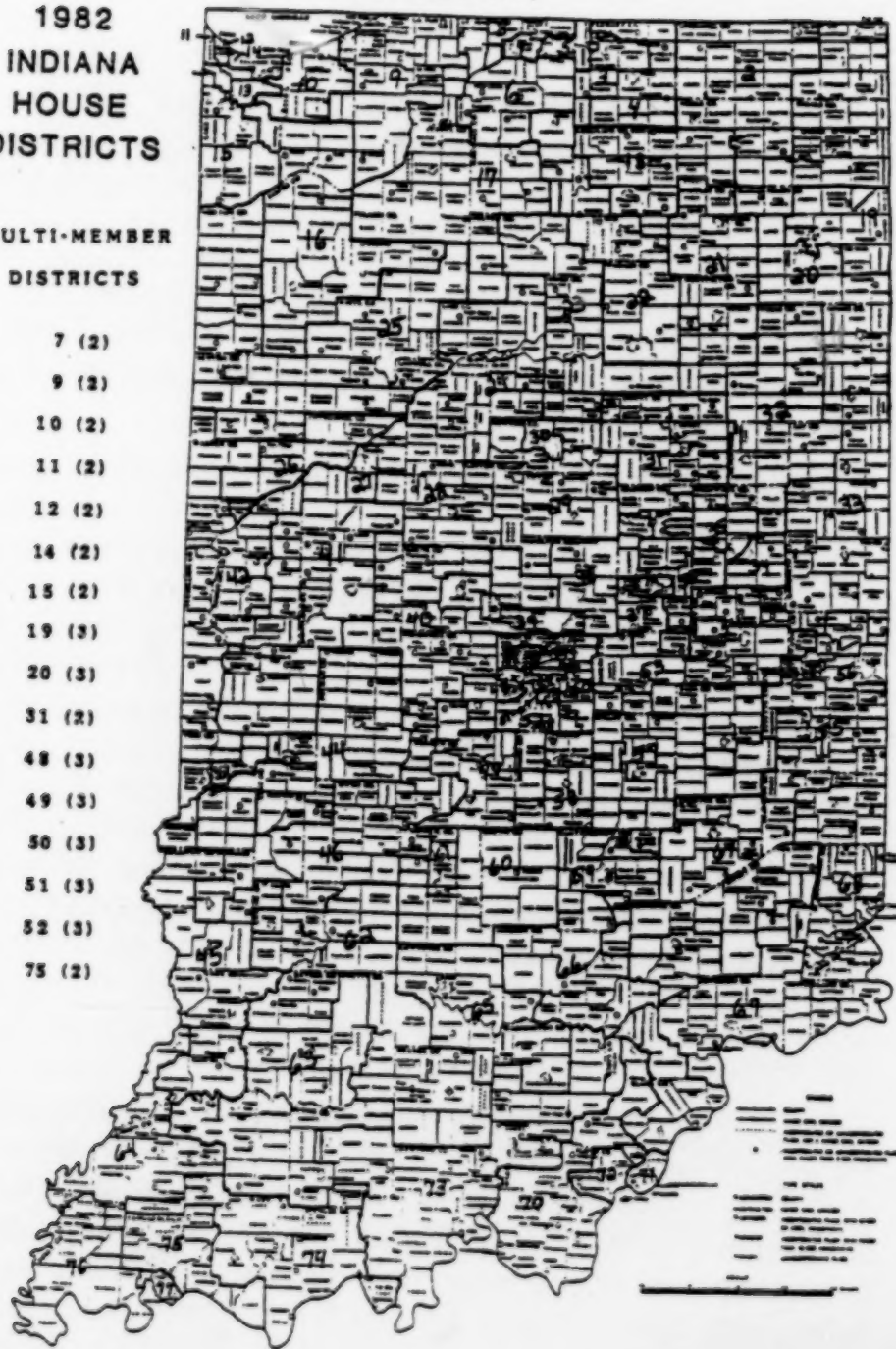
I concur in the majority's decision that defendants have not discriminated against NAACP plaintiffs on account of their race in violation of either the Fifteenth Amendment or Section 2 of the Voting Rights Act. I dissent, however, from that part of the majority's decision that holds that defendants discriminated against NAACP and Bandemer plaintiffs as Democrats in violation of the Equal Protection Clause of the Fourteenth Amendment.

Court Exhibit A

1982
INDIANA
HOUSE
DISTRICTS

MULTI-MEMBER
DISTRICTS

- 7 (2)
- 9 (3)
- 10 (2)
- 11 (2)
- 12 (2)
- 14 (2)
- 15 (2)
- 19 (3)
- 20 (3)
- 31 (2)
- 48 (3)
- 49 (3)
- 50 (3)
- 51 (3)
- 52 (3)
- 75 (2)



Court Exhibit B

INDIANA
STATE
SENATE
1981



BEST AVAILABLE COPY

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IRWIN C. BANDEMER, et al.,)	
)	
<i>Plaintiffs,</i>)	
)	
vs.)	Cause No. IP-82-56-C
)	
SUSAN J. DAVIS, et al.,)	
)	
<i>Defendants.</i>)	
)	
<hr/>		
)	
INDIANA N.A.A.C.P. STATE)	
CONFERENCE OF BRANCHES,)	
et al.,)	
)	
<i>Plaintiffs,</i>)	
)	
vs.)	Cause No. IP-82-164-C
)	
ROBERT D. ORR, Governor)	
State of Indiana, et al.,)	
)	
<i>Defendants.</i>)	

MOTION TO MODIFY OR AMEND

Defendants respectfully ask this Court to alter or amend its Opinion and Order entered December 13, 1984. This amendment is necessary for clarification so that the

Defendant members of the Indiana General Assembly know more specifically what guideline priority must be followed in any reapportionment during the 104th Session of the Indiana General Assembly in 1985, and for other reasons set forth in this Motion.

1. The Court recognizes that it has created a new guideline never before required in any Court decision reviewing state reapportionment plans—that is, that there be no partisan or political gerrymandering (p. 25, 26). The Court also has created other new guidelines in the context of multi-member districts never before required in state reapportionment plans—no “ethnic” gerrymandering and no “economic” gerrymandering (p. 37).

The Court also found that the Indiana General Assembly did, in fact, follow as its primary guideline, the one man—one vote requirement of the federal Constitution (p. 19). The Court also found that the Indiana General Assembly also followed the guideline of not diluting the black vote by use of its “no retrogression” rule (p. 11, 20) and by the fact that black representation is proportional to black population in Indiana (p. 20). The Indiana General Assembly preserved black majority districts existing before reapportionment in spite of the fact that black majority Senate District 34 in Marion County had lost population of 36,064 (“SEN 1971” in Defendants’ Exhibit 1); black majority House District 45 in Marion County had lost population of 56,226 (“HR 1972” in Defendants’ Exhibit 1); and Black Majority House District 5 in Lake County had lost population of 29,592 (“HR 1972” in Defendants’ Exhibit 1 and Z). The evidence also shows that the Legislature followed the guideline of preserving black voting strength in all other existing districts, subject to the one man—one vote requirement and the maintaining of black majority districts, the minority populations in the House Districts concededly having been “kept intact”, (Dailey deposition, Exhibit 7) according to the author of the “Crawford Plan” of the Democrat

Plaintiffs. See, for example, N.A.A.C.P. Exhibit 244; Bosma deposition, pp. 52-3; Campbell deposition, p. 20. Therefore by following this guideline the Indiana General Assembly protected the voting rights of blacks as blacks as required by the federal Constitution and the Voting Rights Act (p. 24).

However, as a matter of guideline priority, Defendants seek guidance as to what priority to assign to the new guideline of no “political gerrymandering”.

The Court recognizes that there are heavy concentrations of Democrats in urban areas (p. 14) that are black (p. 21). See N.A.A.C.P. Exhibit 216, p. 2. The Court finds it unconstitutional that existing districts in urban areas are overwhelmingly Democrat (and black) and calls this a “stacking” (p. 15, 20, 22) of Democrat voters. However, the undisputed evidence shows that to reduce the heavy concentration of Democrat voters in districts in Marion, Lake and Allen counties would necessarily require district lines to be changed to include in these districts Republicans (largely white). This would inevitably reduce the percent of black citizens in these existing Democrat black majority districts. Democrats (blacks) thus moved to accommodate Republicans would necessarily be placed in another district with Republicans (largely white), also causing black vote dilution.

This would also be true if single-member districts are to be used in urban areas instead of multi-member districts. Single-member districts must also be heavily black and heavily Democratic to avoid racial vote dilution. See N.A.A.C.P. Exhibit 215, p. 6.

Therefore, Defendants need guidance from this Court as to which guideline, racial or political party, should receive priority.

The Court holds that proportional representation is not required (p. 30) but what is? See *Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Minn. L. Rev. 1121, 1127, cited in the dissenting Opinion of Judge Pell (p. 57). In fact, in 1982 there was proportional representation in the Senate races. See the dissenting opinion of Judge Pell (p. 56). The Court holds that a 45-55% range is "competitive" (p. 13), and in 1982 39 House seats were in this range (Defendant's Exhibit HH). If the Democrats had won these competitive seats, there would have been 67 House Democrats in 1982.

2. The Court finds that constitutional judgments must be made on the basis of "those who align themselves with the Democratic Party (p. 32). However, in determining who is a Democrat the Court refers to the vote in statewide races in 1974, 1964 and 1978 (p. 12) and again to the votes for all Republican and Democrat candidates for the Indiana House and the Indiana Senate in 1982 (p. 14). What race or races should be used? What about persons labelling themselves as "Independents"?

Therefore, this Court should clarify what it deems to be a "Democrat", so that reapportionment could proceed to protect the specific group so intended.

3. The guidelines of community of interest, compactness and not crossing city, county and township boundaries were deemed secondary to the guidelines of one man—one vote and no racial vote dilution throughout all of the districts in Indiana. Neither the Crawford Plan nor the Carson Plan purported to meet both these two priority guidelines. "No dilution of the black vote" is a recognized priority guideline. See *Karcher v. Daggett*, ___ U.S. ___, 103 S.Ct. 2653, 77 L.Ed.2d 133, 148 (1983). Therefore, Defendants seek clarification as to whether it would be appropriate for the Indiana General Assembly to relax its

one man-one vote requirement to allow districts with more community of interest, more compact configurations, and not so many crossings of city, county and township boundary lines.

4. The Court holds that partisan comments by Republican legislative leaders (p. 9-10) indicated purposeful political gerrymandering. But comparable comments were made by Democrat legislators as well. See, for example, Garton deposition (p. 125). To what extent, if any, is partisanship a proper part of the reapportionment process?

5. Of what priority are the new guidelines of "ethnic" gerrymandering and "economic" gerrymandering?

6. In any reapportionment effort, Defendants will base their plan on the 1980 U.S. census data which was readily available to all parties in 1981 and at the trial in this cause, regardless of any changes since that date. The Defendants need clarification from the Court if this is not the proper basis on which to proceed.

7. Any election required to fill vacancies before the November 6, 1986 general elections shall be held based on the districts created in the 1981 House and Senate reapportionment acts and the 1982 amendments thereto, pursuant to I.C. 2-2.1-2. The Defendants need clarification from the Court if this is not the proper basis on which to proceed.

WHEREFORE, Defendants respectfully ask the Court to act on this Motion promptly in order for the Indiana General Assembly to have as much time as possible before reconvening in January, 1985 to decide what it can do to meet these strictures of the Court.

Respectfully submitted,

/S/ William M. Evans

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[Certificate of Service]

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IRWIN C. BANDEMER, et al.,)

Plaintiffs,)

vs.)

SUSAN J. DAVIS, et al.,)

Defendants.)

Cause No. IP-82-56-C

INDIANA N.A.A.C.P. STATE
CONFERENCE OF BRANCHES,
et al.,)

Plaintiffs,)

vs.)

ROBERT D. ORR, Governor
State of Indiana, et al.,)

Defendants.)

Cause No. IP-82-164-C

Before PELL, Senior Circuit Judge, NOLAND, Chief
District Judge, and BROOKS, District Judge.

ORDER

JAMES E. NOLAND, Chief District Judge and GENE E. BROOKS, District Judge.

This cause is now before the Court upon the defendants' Motion to Modify or Amend and the Bandemer plaintiffs' response thereto.

Whereupon the Court, having considered the motion and the response thereto, and being duly advised in the premises, hereby ORDERS that the Motion to Modify or Amend is DENIED. Further directives from this Court are neither appropriate nor necessary. The defendants by their motion request this Court to render an advisory opinion, but it is not the function of this Court to do so. The Court's opinion of December 13, 1984 is sufficiently explanatory for purposes of its effectuation by the Indiana legislature. Accordingly, the defendants' Motion to Modify or Amend is DENIED and it is so ordered this 27th day of December, 1984.

Pell, Senior Circuit Judge, concurring and dissenting. Insofar as the defendants' motion to modify or amend may be construed as a request for an advisory opinion, I concur in the present majority order that the opinion must speak for itself. In view of the broad sweep and the internal contradictions in the opinion of December 13, 1984, it is appropriate to add to the last sentence the phrase: "no matter how difficult it is to discern what that opinion is saying should be done."

I disagree with the majority's denial of the motion, however, and respectfully dissent. As I read the motion, it, in essence, is challenging the correctness of the December 13th opinion, which roams far and wide into untrod territory with no previous guidelines or prior decisional

constitutional justification. I adhere to the views expressed in my prior dissent and regret that the majority chooses to ignore the faults of the majority opinion as demonstrated in the motion to modify or amend rather than taking this opportunity to correct those faults.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IRWIN C. BANDEMER, et al.,)

Plaintiffs,)

vs.)

SUSAN J. DAVIS, et al.,)

Defendants.)

INDIANA N.A.A.C.P. STATE
CONFERENCE OF BRANCHES,
et al.,)

Plaintiffs,)

vs.)

ROBERT D. ORR, Governor
State of Indiana, et al.,)

Defendants.)

) Cause No. IP-82-56-C

) Cause No. IP-82-164-C

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Susan J. Davis, John
Livengood, and Thomas S. Milligan, as members of the

Indiana State Election Board, Laurie Potter Christie, as Executive Director of the Indiana State Election Board, and Edwin J. Simcox, as Secretary of State of the State of Indiana, defendants in Cause No. IP 82-56-C, hereby appeal to the Supreme Court of the United States pursuant to 28 U.S.C. §1253 from those portions of this Court's Opinion and Order entered December 13, 1984, with respect to the issues raised in Cause No. IP 82-56-C, which (i) declared unconstitutional under the Fourteenth Amendment to the United States Constitution the 1981 Indiana House of Representatives and Senate reapportionment act and the 1982 amendments thereto, (ii) enjoined the Indiana state officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto, and (iii) ordered the Indiana General Assembly in 1985 to enact legislation to redistrict the State and reapportion the legislative seats in the General Assembly.

/S/ William M. Evans

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[PROOF OF SERVICE]

APPENDIX E

1981 House Plan, As Amended in 1982 Ind. Code §2-1-1.5

Chapter 1.5. House of Representatives Districts; 1981 Plan.

- 2-1-1.5-1 Definitions; incorporation by reference of census report and documents; precincts, districts, etc.; descriptions and maps
- 2-1-1.5-2 New precincts; establishment
- 2-1-1.5-3 Number of members; allocation to districts
- 2-1-1.5-4 Parts of state not described as within district or described as within multiple districts
- 2-1-1.5-5 Application of chapter; declaration of unconstitutionality; effect
- 2-1-1.5-6 First District
- 2-1-1.5-7 Second District
- 2-1-1.5-8 Third District
- 2-1-1.5-9 Fourth District
- 2-1-1.5-10 Fifth District
- 2-1-1.5-11 Sixth District
- 2-1-1.5-12 Seventh District
- 2-1-1.5-13 Eighth District
- 2-1-1.5-14 Ninth District
- 2-1-1.5-15 Tenth District
- 2-1-1.5-16 Eleventh District
- 2-1-1.5-17 Twelfth District
- 2-1-1.5-18 Thirteenth District
- 2-1-1.5-19 Fourteenth District
- 2-1-1.5-20 Fifteenth District
- 2-1-1.5-21 Sixteenth District
- 2-1-1.5-22 Seventeenth District
- 2-1-1.5-23 Eighteenth District
- 2-1-1.5-24 Nineteenth District
- 2-1-1.5-25 Twentieth District
- 2-1-1.5-26 Twenty-First District
- 2-1-1.5-27 Twenty-Second District

- 2-1-1.5-28 Twenty-Third District
- 2-1-1.5-29 Twenty-Fourth District
- 2-1-1.5-30 Twenty-Fifth District
- 2-1-1.5-31 Twenty-Sixth District
- 2-1-1.5-32 Twenty-Seventh District
- 2-1-1.5-33 Twenty-Eighth District
- 2-1-1.5-34 Twenty-Ninth District
- 2-1-1.5-35 Thirtieth District
- 2-1-1.5-36 Thirty-First District
- 2-1-1.5-37 Thirty-Second District
- 2-1-1.5-38 Thirty-Third District
- 2-1-1.5-39 Thirty-Fourth District
- 2-1-1.5-40 Thirty-Fifth District
- 2-1-1.5-41 Thirty-Sixth District
- 2-1-1.5-42 Thirty-Seventh District
- 2-1-1.5-43 Thirty-Eighth District
- 2-1-1.5-44 Thirty-Ninth District
- 2-1-1.5-45 Fortieth District
- 2-1-1.5-46 Forty-First District
- 2-1-1.5-47 Forty-Second District
- 2-1-1.5-48 Forty-Third District
- 2-1-1.5-49 Forty-Fourth District
- 2-1-1.5-50 Forty-Fifth District
- 2-1-1.5-51 Forty-Sixth District
- 2-1-1.5-52 Forty-Seventh District
- 2-1-1.5-53 Forty-Eighth District
- 2-1-1.5-54 Forty-Ninth District
- 2-1-1.5-55 Fiftieth District
- 2-1-1.5-56 Fifty-First District
- 2-1-1.5-57 Fifty-Second District
- 2-1-1.5-58 Fifty-Third District
- 2-1-1.5-59 Fifty-Fourth District
- 2-1-1.5-60 Fifty-Fifth District
- 2-1-1.5-61 Fifty-Sixth District
- 2-1-1.5-62 Fifty-Seventh District
- 2-1-1.5-63 Fifty-Eighth District
- 2-1-1.5-64 Fifty-Ninth District
- 2-1-1.5-65 Sixtieth District
- 2-1-1.5-66 Sixty-First District
- 2-1-1.5-67 Sixty-Second District
- 2-1-1.5-68 Sixty-Third District
- 2-1-1.5-69 Sixty-Fourth District
- 2-1-1.5-70 Sixty-Fifth District
- 2-1-1.5-71 Sixty-Sixth District
- 2-1-1.5-72 Sixty-Seventh District
- 2-1-1.5-73 Sixty-Eighth District
- 2-1-1.5-74 Sixty-Ninth District
- 2-1-1.5-75 Seventieth District
- 2-1-1.5-76 Seventy-First District
- 2-1-1.5-77 Seventy-Second District
- 2-1-1.5-78 Seventy-Third District
- 2-1-1.5-79 Seventy-Fourth District
- 2-1-1.5-80 Seventy-Fifth District
- 2-1-1.5-81 Seventy-Sixth District
- 2-1-1.5-82 Seventy-Seventh District

2-1-1.5-1 Definitions; incorporation by reference of census report and documents; precincts, districts, etc.; descriptions and maps

Sec. 1. (a) For the purposes of this chapter, the terms "precinct code", "census tract",

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"town", "city", "county", and "township" or the common abbreviations thereof, have the same meanings and describe the same geographical boundaries as they do when used by the United States Department of Commerce, Bureau of the Census, in reporting the 1980 decennial census of the state of Indiana. In addition, the official report and all official documents relating to the report of this census are incorporated by reference into this chapter.

(b) All other references made in the descriptions of house of representatives districts in this chapter are to the precincts, districts, election districts, and wards existing January 1, 1981, and depicted by descriptions and maps maintained by the state election board under IC 3-1-3-4. The state election board shall separately maintain and preserve those descriptions and maps of precincts, districts, election districts, and wards existing on January 1, 1981, notwithstanding any subsequent changes in precinct, district, election district, and ward boundaries. The state election board shall make the descriptions and maps referred to in this section available for public inspection during regular office hours. *As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.1.*

2-1-1.5-2 New precincts; establishment

Sec. 2. After August 31, 1981, existing precinct boundaries may be changed and new precincts may be established. However, no precinct may be divided by a house of representatives district boundary. *As added by Acts 1981, P.L.3, SEC.1.*

2-1-1.5-3 Number of members; allocation to districts

Sec. 3. The house of representatives of the Indiana general assembly consists of one hundred (100) members. The representatives shall be elected from districts as described in this chapter, with each district having one (1) or more representatives. *As added by Acts 1981, P.L.3, SEC.1.*

2-1-1.5-4 Parts of state not described as within district or described as within multiple districts

Sec. 4. (a) Any part of the state of Indiana which has not been described as included in one (1) of the districts described in this chapter is included within the district that:

- (1) is contiguous to that part; and
- (2) contains the least population per representative of all districts contiguous to that part, according to the 1980 decennial census referred to in section 1 of this chapter.

(b) If any part of the state of Indiana is described in this chapter as being in more than one (1) district, it is included within the district that:

- (1) is one (1) of the districts in which that part is listed in this chapter;
- (2) is contiguous to that part; and
- (3) contains the least population per representative, according to the 1980 decennial census referred to in section 1 of this chapter.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-5 Application of chapter; declaration of unconstitutionality; effect

Sec. 5. This chapter first applies to elections conducted in 1982, notwithstanding any other law. However, if this chapter is declared to be unconstitutional, IC 2-1-1.2 is applicable in place of this chapter. *As added by Acts 1981, P.L.3, SEC.1.*

2-1-1.5-6 First District

Sec. 6. The First District, having one (1) member, consists of the following:

Steuben County—All except
Millgrove and Jackson Townships
DeKalb County—All

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-7 Second District

Sec. 7. The Second District, having one (1) member, consists of the following:

LaGrange County—All
Noble County:

Perry Twp.
Elkhart Twp.
Orange Twp.
Wayne Twp.
Albion Twp.
Allen Twp.
Green Twp.
Jefferson Twp.
Steuben County:
Millgrove Twp.
Jackson Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-8 Third District

Sec. 8. The Third District, having one (1) member, consists of the following:

Elkhart County:
Concord 43, 44 & 46
Concord 25, 34 & 36
Concord 30 & 32
Concord 41
Concord 58, 59 & 61
Concord 60
Concord 62
Harrison Twp.
Jefferson Twp.
Locke Twp.
Osolo 29 & 40
Osolo 38 & 39
Osolo 63
Osolo 65
Olive Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-9 Fourth District

Sec. 9. The Fourth District, having one (1) member, consists of the following:

Elkhart County:
Benton Twp.
Clinton Twp.
Elkhart 1 & 2
Elkhart 15
Elkhart 3, 8, 10, 12, 13 & 14
Elkhart 4
Elkhart 5

Elkhart 17
Jackson Twp.
Middlebury Twp.
Osolo 64 & 67
Osolo 66
Union Twp.
Washington Twp.
York Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-10 Fifth District

Sec. 10. The Fifth District, having one (1) member, consists of the following:

Elkhart County:

Baugo 74
Baugo 76
Cleveland 79
Cleveland 80
Cleveland 81
Concord 27 & 54
Concord 49
Concord 50
Concord 52 & 48
Concord 55
Concord 57

St. Joseph County:

Mishawaka Election District 6 Precinct 4
Mishawaka Election District 3 Precincts 5 & 6
Mishawaka Election District 4 Precinct 3
Mishawaka Election District 3 Precincts 2, 3, 4, 4A Election District 4 Precinct 6
Mishawaka Election District 5 Precincts 3 & 4
Mishawaka Election District 3 Precinct 8
Mishawaka Election District 4 Precincts 4, 5 & Election District 6 Precinct 1
Mishawaka Election District 6 Precinct 3
Mishawaka Election District 5 Precinct 2
Penn Precinct 1
Penn Precinct 10
Penn Precinct 13
Penn Precinct 6
Penn Precinct 7
Penn Precincts 2, 4 & 5

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-11 Sixth District

Sec. 11. The Sixth District, having one (1) member, consists of the following:

Marshall County:

Polk Twp.

North Twp.

St. Joseph County:

Center Precinct 1

Center Precinct 3

Center Precinct 4

Center Precinct 5

Center Precinct 6

Center Precincts 7 & 8

Center Precincts 2 & 9

Greene Twp.

Liberty Twp.

Lincoln Twp.

Olive Twp.

Mishawaka Election District 1 Precinct 8

Mishawaka Election District 2 Precincts 5, 6 & Election District 3 Precinct 7

Mishawaka Election District 4 Precinct 1

Mishawaka Election District 4 Precinct 7

Mishawaka Election District 3 Precinct 1

Mishawaka Election District 4 Precinct 2

Mishawaka Election District 2 Precinct 7

Mishawaka Election District 2 Precincts 1 & 2

Mishawaka Election District 4 Precinct 8

Madison Twp.

Penn Precinct 12

Penn Precinct 14

Penn Precinct 3

Penn Precinct 8

Penn Precinct 9

South Bend Election District 5 Precinct 21

South Bend Election District 5 Precincts 13 & 25

South Bend Election District 5 Precinct 18

South Bend Election District 5 Precinct 23

South Bend Election District 5 Precincts 24 & 26

South Bend Election District 5 Precinct 9

South Bend Election District 5 Precincts 17 & 22

Union Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.2

2-1-1.5-12 Seventh District

Sec. 12. The Seventh District, having two (2) members, consists of the following:

St. Joseph County:

Clay Precinct 2

German Precinct 3

Mishawaka Election District 1 Precincts 1, 2 & 3

Mishawaka Election District 1 Precinct 4

Mishawaka Election District 2 Precinct 3

Mishawaka Election District 1 Precinct 5

Mishawaka Election District 1 Precinct 7 & Election District 2 Precinct 4

Portage Precinct 1

Portage Precinct 3

Portage Precinct 4

Portage Precinct 5

Portage Precincts 2 & 6

South Bend Election District 4 Precincts 4, 7, 8 & 9

South Bend Election District 6 Precinct 24

South Bend Election District 2 Precinct 19

South Bend Election District 2 Precinct 1

South Bend Election District 6 Precinct 9

South Bend Election District 3 Precinct 16

South Bend Election District 5 Precinct 8

South Bend Election District 1 Precincts 8, 13 & 15

South Bend Election District 4 Precinct 17

South Bend Election District 3 Precincts 13, 14 & 15

South Bend Election District 4 Precinct 15

South Bend Election District 4 Precinct 22

South Bend Election District 1 Precinct 7

South Bend Election District 3 Precinct 18

South Bend Election District 4 Precinct 21

South Bend Election District 4 Precinct 5 & Election District 6 Precinct 5

South Bend Election District 4 Precinct 13

South Bend Election District 4 Precinct 12

South Bend Election District 2 Precinct 2 & Election District 6 Precinct 17

South Bend Election District 2 Precinct 7

South Bend Election District 5 Precinct 16

South Bend Election District 4 Precincts 3 & 11

South Bend Election District 4 Precinct 25

South Bend Election District 4 Precincts 18, 19 & 20

South Bend Election District 5 Precinct 12

South Bend Election District 4 Precinct 16

South Bend Election District 1 Precinct 18

South Bend Election District 2 Precincts 3, 4, 5, 9, 10, 11, & 12

South Bend Election District 6 Precinct 15

South Bend Election District 6 Precinct 6

South Bend Election District 6 Precinct 19

South Bend Election District 2 Precinct 13

South Bend Election District 6 Precinct 18

South Bend Election District 1 Precinct 11

South Bend Election District 2 Precinct 6

South Bend Election District 2 Precinct 8

South Bend Election District 5 Precincts 14 & 19

South Bend Election District 1 Precinct 2

South Bend Election District 3 Precincts 4, 6, 7, 8, 11 & 12

South Bend Election District 2 Precincts 16 & 16A

South Bend Election District 6 Precincts 10-14, 20-22 & 25

South Bend Election District 1 Precincts 1, 4 & 5

South Bend Election District 3 Precinct 2 & District 5 Precinct 7

South Bend Election District 2 Precincts 14 & 15

South Bend Election District 6 Precinct 16

South Bend Election District 5 Precinct 20

South Bend Election District 3 Precincts 3, 17 & 19

South Bend Election District 2 Precincts 18, 20 & 21

South Bend Election District 5 Precinct 10

South Bend Election District 5 Precinct 15

South Bend Election District 3 Precinct 5

South Bend Election District 2 Precinct 17

South Bend Election District 6 Precinct 23

South Bend Election District 5 Precinct 11

South Bend Election District 3 Precincts 9 & 10

South Bend Election District 4 Precinct 14

South Bend Election District 6 Precincts 7 & 8

South Bend Election District 5 Precincts 5 & 6

South Bend Election District 1 Precincts 6 & 9

South Bend Election District 1 Precinct 14

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.3

2-1-1.5-13 Eighth District

Sec. 13. The Eighth District, having one (1) member, consists of the following:

St. Joseph County:

Clay Precinct 14

Clay Precinct 15

Clay Precinct 17

Clay Precinct 19

Clay Precinct 3

Clay Precinct 5

Clay Precinct 6

Clay Precincts 1, 4 & 10

Clay Precincts 12, 18

Clay Precincts 7, 8, 9, 11, 13 & 16

German Precinct 1

German Precincts 2 & 4

Harris Precinct 2

Harris Precincts 1 & 3

Mishawaka Election District 5 Precinct 6

Mishawaka Election District 5 Precinct 7

Mishawaka Election District 5 Precinct 8

Mishawaka Election District 5 Precinct 5

Mishawaka Election District 6 Precincts 5, 6, 7 & 8

Penn Precinct 11

Portage Precinct 1A

South Bend Election District 1 Precinct 3

South Bend Election District 1 Precincts 10, 16, 17, 19

South Bend Election District 4 Precinct 24

South Bend Election District 4 Precincts 6 & 10

South Bend Election District 1 Precinct 12
 South Bend Election District 4 Precinct 23
 South Bend Election District 1 Precinct 12A

Warren Precinct 1, 2 & 3
 Warren Precinct 4

As added by Acts 1981, P.L.3, SEC.1.

2-1-15-14 Ninth District

Sec. 14. The Ninth District, having two (2) members, consists of the following:

LaPorte County:

Center 2
 Cass
 Center 1
 Clinton
 Cool Spring 1 & 2
 Dewey Twp.
 Calena
 Hudson
 Kankakee
 LaPorte City Ward 2 Precinct 3-4, Ward 3
 Precinct 3, Ward 5 Precincts 3 & 4
 LaPorte City Ward 5 Precinct 1
 LaPorte City Ward 3 Precincts 1-2
 LaPorte City Ward 1 Precincts 1-2, Ward 2
 Precincts 1-2
 LaPorte City Ward 4 Precinct 3
 LaPorte City Ward 1 Precinct 3, Ward 4
 Precincts 1-2
 LaPorte City Ward 4 Precinct 4
 Long Beach
 Michigan
 Michigan City Ward 1 Precinct 3
 Michigan City Ward 6 Precinct 1
 Michigan City Ward 2 Precincts 1-2
 Michigan City Ward 5 Precincts 1-4
 Michigan City Ward 1 Precinct 1
 Michigan City Ward 6 Precinct 2
 Michigan City Ward 4 Precinct 2
 Michigan City Ward 4 Precinct 3
 Michigan City Ward 1 Precinct 2 Ward 3
 Precinct 1
 Michigan City Ward 4 Precinct 1
 Michigan City Ward 2 Precincts 3 & 4

Michigan City Ward 3 Precincts 2-4

Hanna Twp.
 New Durham
 Noble Twp.
 Pleasant Twp.
 Prairie Twp.
 Scipio Twp.
 Springfield Twp.
 Washington Twp.
 Wills Twp.

Porter County:

Pine Precincts 1 & 2
 Washington Twp.

*As added by Acts 1981, P.L.3, SEC.1. Amended
 by Acts 1982, P.L.4, SEC.4.*

2-1-15-15 Tenth District

Sec. 15. The Tenth District, having two (2) members, consists of the following:

Lake County:

Hobart District 2
 Hobart Township Precinct 5
 Hobart Twp. Precinct 8: only those portions that fall within Census Tracts 416 & 418, but not that portion within Census Tract 421.
 Ross Township Precinct 20
 Ross Township Precinct 12
Porter County:
 Center Precinct 12
 Center Precinct 16
 Center Precincts 18 & 20
 Center Precinct 19
 Center Precinct 23
 Center Precinct 9
 Center Precincts 1, 2, 5, 7, 10, 13 & 22
 Center Precincts 3, 4, 8, 11 & 17
 Center Precincts 6, 14, 15 & 21
 Liberty Precinct 1
 Liberty Precinct 2
 Liberty Precinct 3
 Portage Precincts 2, 5, 12 & 23
 Portage Precinct 10
 Portage Precinct 24
 Portage Precinct 21

Portage Precinct 22
 Portage Precinct 4
 Portage Precincts 6 & 8
 Portage Precincts 11 & 16
 Portage Precincts 1, 15 & 19
 Portage Precincts 3, 7, 17 & 18
 Portage Precincts 9, 13 & 14
 Portage Precinct 20
 Union 1 & 2
 Jackson Township
 Westchester Precincts 1, 3, 4, 5, 7, 8, 9, 10 & 12
 Westchester Precinct 11
 Westchester Precinct 6
 Westchester Precinct 2

*As added by Acts 1981, P.L.3, SEC.1. Amended
 by Acts 1982, P.L.4, SEC.5.*

2-1-15-16 Eleventh District

Sec. 16. The Eleventh District, having two (2) members, consists of the following:

Lake County:

Griffith Precinct 7
 Griffith Precincts 8 & 9
 Hammond District 2 Precinct 7, District 3
 Precincts 2, 4, 8, 9 & District 4 Precincts 17 & 18
 Hammond District 1 Precinct 14
 Hammond District 1 Precinct 6
 Hammond District 1 Precinct 2
 Hammond District 1 Precincts 3, 7-12 & District 2 Precincts 1 & 3
 Hammond District 1 Precinct 1
 Hammond District 1 Precinct 5
 Hammond District 1 Precinct 13
 Hammond District 1 Precinct 4
 Hammond District 1 Precinct 15
 Hammond District 2 Precinct 11
 Hammond District 2 Precincts 9 & 10
 Hammond District 2 Precinct 12
 Hammond District 2 Precinct 2
 Hammond District 2 Precinct 8
 Hammond District 2 Precinct 5
 Hammond District 2 Precinct 4
 Hammond District 2 Precincts 6, 13-16 & District 3 Precincts 1, 5, 6

Hammond District 3 Precinct 10
 Hammond District 3 Precinct 11
 Hammond District 3 Precinct 3
 Hammond District 3 Precinct 13
 Hammond District 3 Precinct 7
 Hammond District 3 Precinct 15
 Hammond District 3 Precinct 14
 Hammond District 3 Precinct 12
 Hammond District 3 Precinct 16 & District 5 Precinct 5

Hammond District 4 Precinct 14
 Hammond District 4 Precincts 1, 6 & 8
 Hammond District 4 Precincts 4 & 5
 Hammond District 4 Precinct 3
 Hammond District 4 Precinct 10
 Hammond District 4 Precinct 2
 Hammond District 4 Precincts 7, 9, 12 & 13
 Hammond District 4 Precinct 16
 Hammond District 4 Precinct 11
 Hammond District 5 Precinct 15
 Hammond District 5 Precincts 2 & 7
 Hammond District 5 Precinct 3
 Hammond District 5 Precincts 1, 8-13 & District 4 Precinct 15
 Hammond District 5 Precincts 6 & 14
 Hammond District 5 Precinct 4
 Hammond District 6 Precinct 10
 Highland Precincts 9, 3, 6, 7, 8, 10, 11, 12, 13, 14, 16 & 17
 Highland Precincts 4 & 5
 Highland Precincts 1, 2 & 18
 Highland Precincts 15 & 19
 Whiting Precinct 4
 Whiting Precinct 5
 Whiting Precinct 6
 Whiting Precinct 7
 Whiting Precinct 8
 Whiting Precincts 1-3, 9 & 10

*As added by Acts 1981, P.L.3, SEC.1. Amended
 by Acts 1982, P.L.4, SEC.6.*

2-1-15-17 Twelfth District

Sec. 17. The Twelfth District, having two (2) members, consists of the following:

Lake County:

Calumet Township Precinct 4
 Calumet Township Precincts 5, 6, 10-12
 East Chicago District 6 Precinct 5
 East Chicago District 5 Precinct 5
 East Chicago District 4 Precinct 2
 East Chicago District 6 Precinct 3
 East Chicago District 6 Precinct 2
 East Chicago District 5 Precinct 2
 East Chicago District 6 Precinct 9
 East Chicago District 6 Precinct 4
 East Chicago District 6 Precinct 8
 East Chicago District 5 Precinct 7
 East Chicago District 1 Precincts 2, 3, 4, 5, 6, 7 & 8
 East Chicago District 2 Precincts 1, 2, 3, 6, 7, 8 & 9
 East Chicago District 2 Precinct 4
 East Chicago District 6 Precinct 6
 East Chicago District 6 Precinct 7
 East Chicago District 5 Precinct 4
 East Chicago District 1 Precincts 1 & 6-1
 East Chicago District 5 Precinct 1
 East Chicago District 4 Precinct 1
 East Chicago District 5 Precinct 3
 East Chicago District 1 Precinct 9
 East Chicago District 5 Precinct 9
 East Chicago District 4 Precinct 3
 East Chicago District 5 Precinct 6
 East Chicago District 3 Precincts 7-9
 East Chicago District 5 Precinct 8
 East Chicago District 4 Precinct 6
 East Chicago District 3 Precincts 1-6 & District 4 Precinct 10
 East Chicago District 4 Precincts 7 & 8
 East Chicago District 4 Precinct 4
 East Chicago District 2 Precinct 5
 East Chicago District 4 Precinct 5
 East Chicago District 4 Precinct 9
 Gary District 3 Precincts 2, 3 & District 6 Precincts 17A & 18A
 Gary District 3 Precincts 1, 20, 21, 22 & 23
 Gary District 5 Precincts 7, 13 & 4
 Gary District 5 Precincts 14, 5, 6, 8, 9, 10, 16, 17, 18 & 19
 Gary District 5 Precincts 23, 24 & District 6 Precincts 1 & 5
 Gary District 5 Precincts 11, 12 & 15
 Gary District 6 Precinct 16
 Gary District 6 Precinct 8
 Gary District 6 Precinct 18
 Gary District 6 Precinct 4A
 Gary District 6 Precinct 17
 Gary District 6 Precinct 7
 Gary District 6 Precinct 4
 Gary District 6 Precinct 2
 Griffith Precinct 10
 Griffith Precinct 1
 Griffith Precinct 2
 Griffith Precinct 12
 Griffith Precinct 13
 Griffith Precincts 3, 4 & 11
 Griffith Precincts 5 & 6
 Hammond District 5 Precinct 16 & District 6 Precincts 14 & 15
 Hammond District 6 Precinct 12
 Hammond District 6 Precincts 5, 8, 11 & 13
 Hammond District 6 Precinct 9
 Hammond District 6 Precincts 1, 2, 3 & 4
 Hammond District 6 Precincts 6 & 7
As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.7.

2-1-15-18 Thirteenth District

Sec. 18. The Thirteenth District, having one (1) member, consists of the following:

Lake County:

Calumet Township Precinct 14
 Gary District 5 Precincts 20-22 & District 6 Precincts 21 & 22
 Gary District 6 Precinct 24
 Gary District 6 Precincts 6, 10, 11, 12, 13 & 14
 Gary District 6 Precincts 15, 27 & 28
 Gary District 6 Precinct 9
 Gary District 6 Precinct 26
 Hobart City Districts 1, 3, 4 & 5
 Hobart Township Precinct 8: only that portion that falls within Census Tract 421
 Griffith 7A & St. John 3 & 3A
 Merrillville Precincts 7, 9, 10, 14, 18, 11, 19, 17, 1, 1A, 25, 25A, 22, 22A, 8, 15 & 23

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.8.

3-1-15-19 Fourteenth District

Sec. 19. The Fourteenth District, having two (2) members, consists of the following:

Lake County:

Gary District 1 Precincts 4 & 10
 Gary District 1 Precincts 22-28
 Gary District 1 Precincts 1-3 & Gary District 2 Precinct 1
 Gary District 1 Precincts 29 & 30
 Gary District 1 Precinct 9
 Gary District 1 Precincts 17 & 18
 Gary District 1 Precinct 7
 Gary District 1 Precincts 14-16
 Gary District 1 Precincts 5 & 6
 Gary District 1 Precincts 11-13 & 19-21
 Gary District 1 Precinct 8
 Gary District 2 Precinct 5
 Gary District 2 Precinct 3
 Gary District 2 Precinct 10
 Gary District 2 Precincts 4, 12 & 13
 Gary District 2 Precinct 2
 Gary District 2 Precinct 7
 Gary District 2 Precinct 8
 Gary District 2 Precinct 6
 Gary District 2 Precinct 11
 Gary District 2 Precincts 9, 15-19
 Gary District 2 Precincts 20, 23 & 24
 Gary District 2 Precinct 26
 Gary District 2 Precinct 14
 Gary District 2 Precincts 21, 22 & 25 District 3 Precincts 9-11
 Gary District 3 Precinct 16
 Gary District 3 Precinct 18
 Gary District 3 Precincts 7 & 8
 Gary District 3 Precinct 17
 Gary District 3 Precinct 12
 Gary District 3 Precinct 19
 Gary District 3 Precincts 5 & 6
 Gary District 3 Precinct 14
 Gary District 3 Precinct 13
 Gary District 3 Precinct 15
 Gary District 4 Precincts 6 & 7
 Gary District 4 Precinct 16

Gary District 4 Precinct 4
 Gary District 4 Precincts 1, 3, 5, 24 & 25
 Gary District 4 Precinct 8
 Gary District 4 Precinct 2
 Gary District 4 Precincts 9, 12, 14, 15, 17, 20 & 21
 Gary District 4 Precinct 11
 Gary District 4 Precinct 23
 Gary District 4 Precincts 18, 19 & 22
 Gary District 4 Precinct 10
 Gary District 4 Precinct 13
 Gary District 5 Precinct 1
 Gary District 5 Precinct 3
 Gary District 5 Precinct 2
 Gary District 6 Precincts 19, 20, 23 & 25
 Lake Station Precincts 3A & 7A
 Lake Station Precincts 11, 2, 3, 3B, 4, 4A, 5, 5A, 6A, 7 & 7B
 Lake Station Precincts 6, 8 & 9
 Lake Station Precincts 10 & 1

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.9.

2-1-15-20 Fifteenth District

Sec. 20. The Fifteenth District, having two (2) members, consists of the following:

Lake County:

Cedar Lake Precincts 2, 5 & 7
 Cedar Lake Precincts 1, 4 & 6
 Center Township Precinct 3
 Center Township Precinct 1
 Crown Point Precincts 5 & 7
 Crown Point Precincts 1, 10 & 11
 Crown Point Precinct 3
 Crown Point Precinct 2
 Crown Point Precinct 6
 Crown Point Precincts 4, 8 & 9
 Cedar Creek 1 & 2 & 5
 Cedar Creek 3
 Cedar Creek 4
 Center 2 & 4
 Dyer Precinct 3
 Dyer Precinct 6
 Dyer Precincts 1, 2, 4, & 5

Eagle Creek 1
 Hanover 1 & 2 & 3 & Cedar Lake 3
 Merrillville Precincts 26 & 26A
 Merrillville Precincts 2, 16, 21 & 27
 Merrillville Precinct 6
 Merrillville Precinct 3
 Merrillville Precinct 4
 Munster Precinct 10
 Munster Precinct 20
 Munster Precincts 2, 4, 11, 13, 16-19
 Munster Precincts 12, 14-15
 Munster Precincts 1, 3, 5-7
 Munster Precincts 8 & 9
 Ross Township Precinct 13: only that portion that falls within Census Tract 425
 Schererville Precincts 10 & 10A
 Schererville Precincts 11, 11A & 12
 Schererville Precinct 7
 Schererville Precincts 1-3
 Schererville Precinct 4A
 Schererville Precinct 4
 Schererville Precincts 5, 6, 8 & 9
 St. John Town Precincts 1, 1A & 2
 St. John Township Precincts 1 & 2
 St. John Township Precincts 4, 5 & 6
 West Creek 1 & 2 & 3

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.10.

2-1-1.5-21 Sixteenth District

Sec. 21. The Sixteenth District, having one (1) member, consists of the following:

Jasper County:

Barkley North & South
 Carpenter East & West
 Gillam
 Hanging Grove
 Jordan
 Kankakee
 Keener 1 & 2 & 3 & 4
 Marion 1 & 2 & 3 & 4 & 5 & 6 & 7
 Milroy
 Newton
 Union North & South
 Walker East & West

Wheatfield East & West

Lake County:

Merrillville Precincts 5, 24 & 4A
 Winfield 1

Ross Twp. Precinct 13: only that portion that falls within Census Tract 423

Porter County:

Boone Twp.
 Morgan Twp.
 Pleasant Twp.
 Porter Twp.

Pulaski County:

Salem Twp.
 Jefferson Twp.
 Monroe 1 & 2 & 3 & 4
 White Post

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.11.

2-1-1.5-22 Seventeenth District

Sec. 22. The Seventeenth District, having one (1) member, consists of the following:

LaPorte County:

Lincoln Twp.
 Johnson Twp.
 Union Twp.

Starke County:

Davis Twp.
 Oregon Twp.
 Washington Twp.
 Center Twp.
 Wayne Twp.
 California Twp.
 North Bend Twp.
 Railroad Twp.
 Jackson Twp.

Pulaski County:

Cass Twp.
 Tippecanoe Twp.
 Rich Grove Twp.
 Franklin Twp.

Fulton County:

Aubee-Naabee Twp.
 Union Twp.
 Wayne Twp.

Marshall County:

West Twp.
 Center Twp.
 Union Twp.
 Green Twp.
 Walnut Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.12.

2-1-1.5-23 Eighteenth District

Sec. 23. The Eighteenth District, having one (1) member, consists of the following:

Kosciusko County:

Scott Twp.
 Jefferson Twp.
 Van Buren Twp.
 Turkey Creek Twp.
 Tippecanoe Twp.
 Plain Twp.
 Prairie Twp.
 Wayne Twp.
 Washington Twp.
 Monroe Twp.

Noble County:

Sparta Twp.
 York Twp.
 Washington Twp.
 Noble Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-24 Nineteenth District

Sec. 24. The Nineteenth District, having three (3) members, consists of the following:

Allen County:

Adams A
 Adams B
 Adams 256, Fort Wayne 252, Fort Wayne 255, St. Joseph 260-262, St. Joseph 265
 Cedar Creek A & B
 Cedar Creek C
 Fort Wayne 101 & 104
 Fort Wayne 102, 105 & 107
 Fort Wayne 106
 Fort Wayne 108
 Fort Wayne 109

Fort Wayne 110

Fort Wayne 111 & 112
 Fort Wayne 151 & 154
 Fort Wayne 153
 Fort Wayne 155
 Fort Wayne 156
 Fort Wayne 157 & 158
 Fort Wayne 160
 Fort Wayne 161 & 162
 Fort Wayne 201 & 203
 Fort Wayne 202
 Fort Wayne 204
 Fort Wayne 205
 Fort Wayne 206
 Fort Wayne 207
 Fort Wayne 209, 210 & 254
 Fort Wayne 250
 Fort Wayne 251
 Fort Wayne 253
 Fort Wayne 301 & 350
 Fort Wayne 302, 303, 351 & 352
 Fort Wayne 353
 Fort Wayne 356
 Fort Wayne 357
 Fort Wayne 358
 Fort Wayne 359
 Fort Wayne 504
 Fort Wayne 505
 Fort Wayne 506
 Fort Wayne 507 & 508
 Fort Wayne 601
 Fort Wayne 602
 Fort Wayne 603
 Fort Wayne 606
 Fort Wayne 607
 Jackson
 Jefferson
 Maumee & Maumee Woodburn
 Milan
 Perry A & B
 Perry C
 Perry D
 Perry E
 Scipio
 Springfield

St. Joseph M, O-1, O-2, Q, 263 & 264
 St. Joseph A & St. Joseph C
 St. Joseph B-1, B & 2
 St. Joseph D
 St. Joseph E-1
 St. Joseph E-2, St. Joseph J-1 & St. Joseph N

St. Joseph F
 St. Joseph G
 St. Joseph H-1 & H-2
 St. Joseph J-2
 St. Joseph K-1 & K-2
 St. Joseph L
 St. Joseph P
 St. Joseph R-1
 St. Joseph R-2
 St. Joseph 208, 212, 213, 214 & 309
 St. Joseph 257
 St. Joseph 258
 St. Joseph 259 & 211
 St. Joseph 310
 Washington A
 Washington B
 Washington C
 Washington D
 Washington E
 Washington F
 Washington G
 Washington 304
 Washington 305
 Washington 306 & 307
 Washington 308 & 311
 Washington 360
 Washington 361
 Washington 362
 Washington 401

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-25 Twentieth District

Sec. 25. The Twentieth District, having three (3) members, consists of the following:

Noble County:
 Swan Twp.
 Whitley County:
 Smith Twp.

Adams County—All

Allen County:

Aboite A
 Aboite B
 Aboite C
 Aboite D
 Aboite E
 Aboite F
 Aboite G Wayne B & Wayne C
 Aboite H
 Adams C
 Adams D & Adams E
 Adams F
 Adams G
 Adams H & Adams K
 Adams J
 Adams 610, 611, Fort Wayne 605 & 609
 Adams 612
 Adams 656, 660, 661 & 662
 Adams 657
 Adams 658
 Adams 659
 Eel River
 Fort Wayne 150 & 410
 Fort Wayne 152
 Fort Wayne 354
 Fort Wayne 355
 Fort Wayne 402
 Fort Wayne 403
 Fort Wayne 404
 Fort Wayne 405 & 409
 Fort Wayne 407 & 408
 Fort Wayne 411, 412, 413, 414 & Wayne D
 Fort Wayne 450 & 451
 Fort Wayne 452
 Fort Wayne 453 & 456
 Fort Wayne 454 & 455
 Fort Wayne 457
 Fort Wayne 458 & 459
 Fort Wayne 460
 Fort Wayne 501
 Fort Wayne 502
 Fort Wayne 503
 Fort Wayne 509
 Fort Wayne 510

Fort Wayne 512
 Fort Wayne 513
 Fort Wayne 550
 Fort Wayne 551
 Fort Wayne 552
 Fort Wayne 553
 Fort Wayne 554 & 555
 Fort Wayne 556
 Fort Wayne 557 & 560
 Fort Wayne 558 & 559
 Fort Wayne 604
 Fort Wayne 608
 Fort Wayne 650
 Fort Wayne 651
 Fort Wayne 652
 Fort Wayne 653
 Fort Wayne 654 & 655
 Lafayette A & B
 Lake
 Madison
 Marion A & B
 Monroe
 New Haven 1, 3 & 4
 New Haven 2
 Pleasant A
 Pleasant B
 Wayne A
 Wayne F

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-26 Twenty-First District

Sec. 26. The Twenty-First District, having one (1) member, consists of the following:

Whitley County:
 Etna-Troy Twp.
 Thorn Creek Twp.
 Richland Twp.
 Columbia Twp.
 Union Twp.
 Cleveland Twp.
 Washington Twp.
 Jefferson Twp.
 Huntington County—All except Salamonie Township

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-27 Twenty-Second District

Sec. 27. The Twenty-Second District, having one (1) member, consists of the following:

Marshall County:
 German Twp.
 Bourbon Twp.
 Tippecanoe Twp.
 Kosciusko County:
 Etna Twp.
 Harrison Twp.
 Franklin Twp.
 Seward Twp.
 Clay Twp.
 Lake Twp.
 Jackson Twp.
 Wabash County:
 Pleasant Twp.
 Chester Twp.
 Paw Paw Twp.
 Lagro Twp.
 Noble Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-28 Twenty-Third District

Sec. 28. The Twenty-Third District, having one (1) member, consists of the following:

Fulton County:
 Richland Twp.
 New Castle Twp.
 Rochester Twp.
 Henry Twp.
 Miami County—All except Jackson Township
 Wabash County:
 Waltz Twp.
 Liberty Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-29 Twenty-Fourth District

Sec. 29. The Twenty-Fourth District, having one (1) member, consists of the following:

Fulton County:
 Liberty Twp.
 Cass County—All
 Carroll County:
 Rock Creek Twp.

Liberty Twp.
Washington Twp.
Carrollton Twp.
Burlington Twp.
Monroe Twp.
Jackson Twp.
Deer Creek Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-30 Twenty-Fifth District

Sec. 30. The Twenty-Fifth District, having one (1) member, consists of the following:

Benton County—All except Hickory Grove Twp.

Carroll County:

Jefferson Twp.
Adams Twp.
Tippecanoe Twp.

Pulaski County:

Van Buren Twp.
Harrison Twp.
Beaver Twp.
Indian Creek Twp.

White County—All

Newton County—All

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.13.

2-1-1.5-31 Twenty-Sixth District

Sec. 31. The Twenty-Sixth District, having one (1) member, consists of the following:

Tippecanoe County:

Wabash Twp.
Shelby Twp.
Tippecanoe Twp.

Warren County:

Medina Twp.
Adams Twp.
Warren Twp.
Liberty Twp.
Washington Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-32 Twenty-Seventh District

Sec. 32. The Twenty-Seventh District, having one (1) member, consists of the following:

Tippecanoe County:

Fairfield 1 & 2
Fairfield 11
Fairfield 12
Fairfield 13 & 14
Fairfield 15
Fairfield 16
Fairfield 17
Fairfield 18 & 25
Fairfield 19
Fairfield 20
Fairfield 21
Fairfield 22
Fairfield 23
Fairfield 24
Fairfield 26
Fairfield 27
Fairfield 29
Fairfield 3
Fairfield 31
Fairfield 4
Fairfield 5
Fairfield 6
Fairfield 7
Fairfield 8
Fairfield 9 & 10
Wea Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-33 Twenty-Eighth District

Sec. 33. The Twenty-Eighth District, having one (1) member, consists of the following:

Carroll County:

Madison Twp.
Clay Twp.
Democrat Twp.

Clinton County:

Ross Twp.
Owen Twp.
Michigan Twp.
Union Twp.
Madison Twp.
Washington Twp.
Center Twp.
Perry Twp.

Jackson Twp.
Kirkland Twp.
Hamilton County:
Washington Twp.
Mt. Carmel:
(Clay Twp. Tract 1109.02 p—Block Group 2p, 9 & ED0028)

Boone County:

Marion Twp.
Union Twp.
Worth Twp.

Tippecanoe County:

Fairfield 28 & 30
Perry Twp.
Sheffield Twp.
Washington Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.14.

2-1-1.5-34 Twenty-Ninth District

Sec. 34. The Twenty-Ninth District, having one (1) member, consists of the following:

Clinton County:

Warren Twp.
Forest Twp.
Johnson Twp.
Sugar Creek Twp.

Howard County—All except Jackson Township and that portion of Howard County described as included in House District Thirty under section 35 of this chapter.

Hamilton County:

Adams Twp.
Tipton County—All

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-35 Thirtieth District

Sec. 35. The Thirtieth District, having one (1) member, consists of the following:

Howard County:

Center 1
Center 3
Clay Twp.
Kokomo 11, 12 & 13
Kokomo 14

Kokomo 22
Kokomo 23
Kokomo 21, 24, 51, 54, 61, 62, 63 & 65
Kokomo 31 & 34
Kokomo 32
Kokomo 33
Kokomo 41
Kokomo 42, 43, 44, 45 & 53
Kokomo 52
Kokomo 55
Kokomo 64

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.15.

2-1-1.5-36 Thirty-First District

Sec. 36. The Thirty-First District, having two (2) members, consists of the following:

Grant County—All

Miami County:

Jackson Twp.

Howard County:

Jackson Twp.

Madison County:

Duck Creek Twp.
Boone Twp.
Van Buren Twp.
Lafayette Twp.
Monroe Twp.

Richland Twp. Precincts 1, 2 & 4

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.16.

2-1-1.5-37 Thirty-Second District

Sec. 37. The Thirty-Second District, having one (1) member, consists of the following:

Wells County—All

Huntington County:

Salomonie Twp.

Jay County:

Penn Twp.
Jackson Twp.
Green Twp.
Knox Twp.

Blackford County—All
Delaware County:

Union Twp.
Niles Twp.
Delaware Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-38 Thirty-Third District

Sec. 38. The Thirty-Third District, having one (1) member, consists of the following:

Jay County:

Bear Creek Twp.
Wabash Twp.
Noble Twp.
Wayne Twp.
Madison Twp.
Pike Twp.
Jefferson Twp.
Richland

Henry County:

Stoney Creek Twp.
Blue River Twp.

Wayne County:

Dalton Twp.
Perry Twp.
Franklin Twp.

Randolph County—All

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-39 Thirty-Fourth District

Sec. 39. The Thirty-Fourth District, having one (1) member, consists of the following:

Delaware County:

Liberty Twp.
Monroe Twp.
Precinct 1
Precinct 11
Precinct 17
Precinct 19
Precinct 20
Precinct 29
Precinct 3
Precinct 30
Precinct 32
Precinct 35
Precincts 40, 43, 45 & 48
Precinct 5

Precinct 7
Precincts 9, 22 & 16
Precincts 12, 18, 21, 28, 37, 39, 41 & 46
Precincts 13 & 31
Perry Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.17.

2-1-1.5-40 Thirty-Fifth District

Sec. 40. The Thirty-Fifth District, having one (1) member, consists of the following:

Delaware County:

Hamilton Twp.
Harrison Twp.
Precinct 10
Precincts 14, 15, 23, & 44
Precinct 2
Precinct 24
Precincts 25, 33, 34, & 42
Precinct 26
Precinct 36
Precinct 4
Precinct 55
Precinct 38
Precincts 47 & 49
Precinct 74
Precinct 8
Precincts 6 & 27
Washington Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.18.

2-1-1.5-41 Thirty-Sixth District

Sec. 41. The Thirty-Sixth District, having one (1) member, consists of the following:

Delaware County:

Precinct 53
Precinct 54
Precinct 72
Precinct 71
Salem Twp.

Madison County:

Adams Twp.
Anderson Twp. 11
Anderson Ward 1, Precinct 1

Fall Creek Precinct 2
Fall Creek Precinct 1
Anderson Precinct 9
Anderson Precinct 10
Richland Twp. Precinct 3
Union Twp.

Ward 1 Precincts 2-8, Ward 2 Precincts 2-3 & 7, Ward 5 Precincts 1-5 & 4A

Ward 2 Precinct 1

Ward 4 Precinct 7, Ward 5 Precincts 6 & 8, Ward 6 Precinct 1

Ward 5 Precinct 7

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.19.

2-1-1.5-42 Thirty-Seventh District

Sec. 42. The Thirty-Seventh District, having one (1) member, consists of the following:

Madison County:

Fall Creek Precinct 3 & Precinct 7
Fall Creek 6, 4, 5 & 8
Green Twp.
Stoney Creek Twp.
Ward 2 Precinct 10
Ward 2 Precinct 11
Ward 2 Precinct 4
Ward 2 Precinct 5
Ward 2 Precinct 6
Ward 2 Precinct 8
Ward 2 Precinct 9
Ward 3 Precinct 1
Ward 3 Precinct 2
Ward 3 Precincts 3 & 4
Ward 3 Precincts 5 & 6
Ward 3 Precinct 7
Ward 3 Precinct 8
Ward 3 Precincts 9-10 & Ward 4 Precincts 4-6 & 11

Ward 4 Precinct 1

Ward 4 Precinct 2

Ward 4 Precinct 3

Ward 6 Precinct 11

Ward 6 Precinct 2

Ward 6 Precincts 3 & 7

Ward 6 Precinct 4

Ward 6 Precinct 5
Ward 6 Precinct 6
Ward 6 Precinct 8
Ward 6 Precincts 9 & 10
Anderson Twp. Precinct 5

Hancock County:

Green Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.20.

2-1-1.5-43 Thirty-Eighth District

Sec. 43. The Thirty-Eighth District, having one (1) member, consists of the following:

Madison County:

Pipe Creek Twp.
Jackson Twp.
Hamilton County:
Jackson Twp.
White River Twp.
Noblesville Twp.
Wayne Twp.
Delaware Twp.
Fall Creek Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-44 Thirty-Ninth District

Sec. 44. The Thirty-Ninth District, having one (1) member, consists of the following:

Hamilton County:

Clay Twp.—All except Mt. Carmel: (Tract 1109.02 p—Block Group 2P, 9 & ED0028)

Boone County:

Eagle Twp.
Perry Twp.
Center Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.21.

2-1-1.5-45 Fortieth District

Sec. 45. The Fortieth District, having one (1) member, consists of the following:

Boone County:

Clinton Twp.
Washington Twp.
Sugar Creek Twp.

Jefferson Twp.
 Jackson Twp.
 Harrison Twp.
 Montgomery County:
 Sugar Creek Twp.
 Franklin Twp.
 Walnut Twp.
 Clark Twp.
 Scott Twp.
 Hendricks County:
 Brown Twp.
 Lincoln Twp.
 Middle Twp.
 Union Twp.
 Eel River Twp.
 Marion Twp.
 Center Twp.
 Clay Twp.
 Franklin Twp.
 Washington Twp. Precinct 6
 Morgan County:
 Adams Twp.

*As added by Acts 1981, P.L.3, SEC.1. Amended
 by Acts 1982, P.L.4, SEC.22*

2-1-1.5-46 Forty-First District

Sec. 46. The Forty-First District, having
 one (1) member, consists of the following:

Tippecanoe County:
 Wayne Twp.
 Union Twp.
 Jackson Twp.
 Randolph Twp.
 Lauramie Twp.
 Montgomery County:
 Coal Creek Twp.
 Madison Twp.
 Union Twp.
 Wayne Twp.
 Ripley Twp.
 Brown Twp.
 Fountain County:
 Richland Twp.
 Cain Twp.
 Jackson Twp.

Parke County—All except Liberty Township
As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-47 Forty-Second District

Sec. 47. The Forty-Second District, having
 one (1) member, consists of the following:

Benton County:
 Hickory Grove Twp.
 Warren County:
 Prairie Twp.
 Pine Twp.
 Jordan Twp.
 Pike Twp.
 Steuben Twp.
 Kent Twp.
 Mound Twp.
 Fountain County:
 Shawnee Twp.
 Troy Twp.
 Van Buren Twp.
 Wabash Twp.
 Mill Creek Twp.
 Fulton Twp.
 Logan Twp.
 Davis Twp.
 Parke County:
 Liberty Twp.
 Vermillion County—All
 Vigo County:
 Fayette Twp.
 Harrison 6A
 Harrison 6B
 Otter Creek Twp.

*As added by Acts 1981, P.L.3, SEC.1. Amended
 by Acts 1982, P.L.4, SEC.23.*

2-1-1.5-48 Forty-Third District

Sec. 48. The Forty-Third District, having
 one (1) member, consists of the following:

Vigo County:
 Harrison 1A
 Harrison 1B
 Harrison 1C & 1D
 Harrison 1E
 Harrison 2A & 2D

2-1-1.5-49 Forty-Fourth District

Sec. 49. The Forty-Fourth District, having
 one (1) member, consists of the following:

Clay County—All except Harrison and Lewis
 Townships

Putnam County—All

Vigo County:

Lost Creek Precincts B, C, D & 8G

*As added by Acts 1981, P.L.3, SEC.1. Amended
 by Acts 1982, P.L.4, SEC.25.*

2-1-1.5-50 Forty-Fifth District

Sec. 50. The Forty-Fifth District, having
 one (1) member, consists of the following:

Vigo County:

Harrison 1F & 1G
 Harrison 4A, 5B & 5C
 Prairie Creek Twp.
 Prairieon Twp.
 Sugar Creek Twp.

Sullivan County:

Fairbank Twp.
 Curry Twp.
 Turman Twp.
 Gill Twp.
 Haddon Twp.
 Jefferson Twp.
 Cass Twp.

Greene County:

Wright Twp.

Knox County—All except Vincennes and
 Decker Townships

*As added by Acts 1981, P.L.3, SEC.1. Amended
 by Acts 1982, P.L.4, SEC.26.*

2-1-1.5-51 Forty-Sixth District

Sec. 51. The Forty-Sixth District, having
 one (1) member, consists of the following:

Vigo County:

Honey Creek Twp.
 Harrison Precinct 1H
 Riley Twp.
 Linton Twp.
 Pierson Twp.

Sullivan County:

Harrison 2B
 Harrison 2C
 Harrison 2E
 Harrison 2F
 Harrison 2G
 Harrison 2H
 Harrison 2I & 2J
 Harrison 3A
 Harrison 3B
 Harrison 3C
 Harrison 3E
 Harrison 3F
 Harrison 3G & 3H
 Harrison 3I
 Harrison 3J
 Harrison 3K
 Harrison 4B
 Harrison 4C
 Harrison 4D & 4E
 Harrison 4F
 Harrison 4G
 Harrison 5A & 5H
 Harrison 5D
 Harrison 5E
 Harrison 5F & 5G
 Harrison 6C, 6D, 6E & 6F
 Harrison 7A
 Harrison 7B
 Harrison 7C
 Harrison 7D
 Harrison 7E
 Harrison 7F
 Harrison 7G & 7J
 Harrison 7I & 7H
 Harrison 7K
 Harrison 7L
 Harrison 8A
 Harrison 8B
 Harrison 8C
 Harrison 8D
 Harrison 8E & 8F
 Nevins Twp.
 Lost Creek A & E

*As added by Acts 1981, P.L.3, SEC.1. Amended
 by Acts 1982, P.L.4, SEC.24.*

Jackson Twp.
Hamilton Twp.
Clay County:
Harrison Twp.
Lewis Twp.
Greene County:
Smith Twp.
Jefferson Twp.
Monroe County:
Bean Blossom Twp.
Morgan County:
Jefferson Twp.
Ray Twp.

Owen County—All

*As added by Acts 1981, P.L.3, SEC.1. Amended
by Acts 1982, P.L.4, SEC.27.*

2-1-1.5-52 Forty-Seventh District

Sec. 52. The Forty-Seventh District, having
one (1) member, consists of the following:

Hendricks County:

Liberty Twp.

Morgan County:

Ashland Twp.

Baker Twp.

Gregg Twp.

Monroe Twp.

Clay Twp.

Brown Twp.

Madison Twp.

Harrison Twp.

Green Twp.

Jackson Twp.

Washington Twp.

Johnson County:

Union Twp.

*As added by Acts 1981, P.L.3, SEC.1. Amended
by Acts 1982, P.L.4, SEC.28.*

2-1-1.5-53. Forty-Eighth District

Sec. 53. The Forty-Eighth District, having
three (3) members, consists of the following:

Hendricks County:

Guilford Precinct 1

Guilford Precinct 8

Guilford Precinct 9

Guilford Township—City of Plainfield 3

Guilford Township—City of Plainfield 4, 5,
6, 10, 11, 2, 7, & 12

Washington Precincts 4 & 5

Washington Precinct 3

Washington Precincts 1 & 2

Marion County:

Center Ward 14 Precincts 4 & 5

Center Ward 14 Precinct 1

Center Ward 14 Precinct 6

Center Ward 14 Precinct 3

Pike Precinct 1

Pike Precinct 14

Pike Precinct 18

Pike Precinct 2

Pike Precinct 3

Pike Precincts 4 & 21

Pike Precincts 8 & 20

Pike Precinct 9

Washington Precincts 46 & 69

Washington Precincts 22, 63, 67, 73, & 74

Washington Precincts 33, 34, 53, & 68

Washington Precinct 7

Washington Precincts 26 & 29

Washington Precincts 47 & 48

Washington Precinct 38

Washington Precinct 62

Washington Precincts 2, 12, 43 & Ward 21

Precincts 11 & 12

Washington Precinct 13

Washington Ward 21 Precinct 19

Wayne Precincts 1 & 48

Wayne Precincts 10 & 52

Wayne Precincts 11, 20, & 45

Wayne Precinct 12

Wayne Precinct 13

Wayne Precinct 15

Wayne Precinct 17

Wayne Precincts 18, 27, 59 & 60

Wayne Precinct 19

Wayne Precinct 2

Wayne Precinct 21

Wayne Precinct 22

Wayne Precincts 23, 56, 62 & 63

Wayne Precinct 26

Wayne Precincts 28, 38, 47 & 49

Wayne Precinct 3

Wayne Precinct 31

Wayne Precincts 32, 42, 43, 51, 55, 69, & 72

Wayne Precinct 34

Wayne Precincts 35, 36, 53 & 58

Wayne Precinct 39

Wayne Precincts 4 & 33

Wayne Precinct 40

Wayne Precinct 44

Wayne Precinct 46

Wayne Precincts 5, 25, 37, & Ward 24

Precinct 1 & Ward 19 Precincts 7 & 8

Wayne Precinct 50

Wayne Precinct 54

Wayne Precinct 57

Wayne Precincts 6, 14, 30 & 41

Wayne Precinct 61

Wayne Precinct 66

Wayne Precinct 67

Wayne Precinct 68

Wayne Precincts 7 & 8

Wayne Precinct 70

Wayne Precinct 65

Wayne Precinct 71

Wayne Precinct 73

Wayne Precincts 9, 29, & 64

Wayne Ward 24 Precinct 6

Wayne Ward 24 Precinct 4

Wayne Ward 24 Precinct 5

Wayne Ward 24 Precinct 7

Wayne Ward 24 Precinct 2

Wayne Ward 29 Precinct 28

Wayne Ward 29 Precinct 9

Wayne Ward 29 Precinct 19

Wayne Ward 29 Precinct 12

Wayne Ward 29 Precinct 26

Wayne Ward 29 Precincts 10, 14, & 25

Wayne Ward 29 Precinct 18

Wayne Ward 29 Precinct 7

Wayne Ward 29 Precinct 15

Wayne Ward 29 Precinct 13

Wayne Ward 29 Precinct 20

Wayne Ward 29 Precincts 5 & 8

*As added by Acts 1981, P.L.3, SEC.1. Amended
by Acts 1982, P.L.4, SEC.29.*

2-1-1.5-54 Forty-Ninth District

Sec. 54. The Forty-Ninth District, having
three (3) members, consists of the following:

Marion County:

Lawrence Precinct 39

Lawrence Precincts 9 & 19 & Ward 27
Precinct 12

Lawrence Precinct 41

Lawrence Precinct 21

Lawrence Precinct 43

Lawrence Precincts 4 & 18

Lawrence Precincts 28 & 44

Lawrence Precincts 5, 10, 11, 26 & 40

Lawrence Precincts 27 & 35

Lawrence Precincts 3, 7, 24, 31, 32, 36, & 37

Lawrence Precincts 29 & 33

Lawrence Precinct 2 & Ward 27 Precincts 8
& 13

Lawrence Precinct 14

Lawrence Ward 27 Precincts 11 & 26

Lawrence Ward 27 Precinct 7

Lawrence Ward 27 Precinct 4

Lawrence Ward 27 Precincts 6, 17, & 25

Pike Precincts 10 & 17

Pike Precinct 12

Pike Precinct 13

Pike Precinct 19

Pike Precinct 22

Pike Precinct 5

Pike Precincts 6, 11, 15, 16, & Ward 32

Precincts 2, 4, & 5

Pike Precinct 7

Pike Ward 32 Precincts 1 & 3

Washington Precinct 45

Washington Precinct 35

Washington Precinct 56

Washington Precinct 32

Washington Precinct 37

Washington Precincts 25 & 72

Washington Precinct 57

Washington Precinct 40 Ward 21 Precincts
13, 16, 17 & 18 & Ward 22 Precincts 3 &
13

Washington Precincts 42 & 75
 Washington Precinct 36
 Washington Precinct 71
 Washington Precinct 1
 Washington Precinct 52
 Washington Precincts 44 & 70
 Washington Precincts 8 & 30
 Washington Precinct 23
 Washington Precincts 65 & 66
 Washington Precincts 3 & 41
 Washington Precinct 58
 Washington Precincts 24 & 50
 Washington Precincts 76 & 77
 Washington Precincts 5, 21, 39 & Ward 31
 Precinct 9
 Washington Precinct 15
 Washington Precincts 11, 54 & Ward 21
 Precinct 10
 Washington Precincts 49, 60 & 61
 Washington Precincts 9 & 10
 Washington Precincts 6, 28, 31, & 55
 Washington Precinct 18
 Washington Precincts 4 & 59
 Washington Precinct 20
 Washington Precinct 17
 Washington Precincts 27 & 64
 Washington Precincts 14, 19, 51 & Ward 21
 Precinct 1
 Washington Precinct 16
 Washington Ward 20 Precinct 10
 Washington Ward 20 Precinct 2
 Washington Ward 20 Precincts 1 & 5
 Washington Ward 20 Precinct 4
 Washington Ward 20 Precinct 3
 Washington Ward 20 Precinct 7
 Washington Ward 20 Precinct 6
 Washington Ward 20 Precinct 9
 Washington Ward 20 Precinct 8
 Washington Ward 20 Precinct 12
 Washington Ward 20 Precinct 13
 Washington Ward 21 Precinct 14
 Washington Ward 21 Precinct 23
 Washington Ward 21 Precinct 21
 Washington Ward 21 Precinct 15
 Washington Ward 21 Precinct 22

Washington Ward 21 Precinct 2
 Washington Ward 21 Precinct 20
 Washington Ward 21 Precinct 3
 Washington Ward 21 Precinct 4
 Washington Ward 21 Precinct 5
 Washington Ward 21 Precinct 6
 Washington Ward 21 Precinct 7
 Washington Ward 21 Precinct 8
 Washington Ward 21 Precinct 9
 Washington Ward 22 Precinct 7
 Washington Ward 22 Precinct 6
 Washington Ward 22 Precinct 1
 Washington Ward 22 Precincts 2 & 8
 Washington Ward 22 Precinct 4
 Washington Ward 22 Precinct 14
 Washington Ward 22 Precinct 11
 Washington Ward 22 Precinct 9
 Washington Ward 22 Precinct 10
 Washington Ward 22 Precinct 12
 Washington Ward 31 Precincts 1 & 2
 Washington Ward 31 Precinct 3
 Washington Ward 31 Precinct 8
 Washington Ward 31 Precincts 4, 5, & 7
 Washington Ward 31 Precinct 6
 Wayne Ward 29 Precincts 16, 24, 29, & 30
 Wayne Ward 29 Precinct 11
 Wayne Ward 29 Precincts 21 & 22
 Wayne Ward 29 Precinct 6
 Wayne Ward 29 Precinct 23

*As added by Acts 1981, P.L.3, SEC.1. Amended
 by Acts 1982, P.L.4, SEC.30.*

2-1-15-55 Fiftieth District

Sec. 55. The Fiftieth District, having three
 (3) members, consists of the following:

Marion County:

Center Outside Precinct 4
 Center Ward 10 Precinct 9
 Center Ward 2 Precinct 1
 Center Ward 2 Precincts 3 & 10
 Center Ward 2 Precincts 2, 9, & 11
 Center Ward 2 Precincts 4, 6, & 7
 Center Ward 2 Precinct 8
 Center Ward 2 Precinct 5
 Center Ward 25 Precinct 1

Center Ward 25 Precinct 7
 Center Ward 25 Precinct 10
 Center Ward 25 Precincts 8, 9, 11, 12, & 14
 Center Ward 25 Precinct 5
 Center Ward 25 Precinct 13
 Center Ward 25 Precincts 4 & 6
 Center Ward 25 Precinct 3
 Center Ward 9 Precinct 5
 Center Ward 9 Precinct 16
 Center Ward 9 Precincts 1, 2 & 17
 Center Ward 9 Precinct 10
 Center Ward 9 Precinct 8
 Center Ward 9 Precinct 14
 Center Ward 9 Precinct 4
 Center Ward 9 Precinct 12
 Center Ward 9 Precinct 7
 Center Ward 9 Precinct 9
 Center Ward 9 Precinct 3
 Center Ward 9 Precinct 11
 Center Ward 9 Precinct 6
 Center Ward 9 Precincts 13 & 15
 Franklin Precinct 10
 Franklin Precinct 12
 Franklin Precinct 1
 Franklin Precincts 2 & 8
 Franklin Precinct 6
 Franklin Precinct 11
 Franklin Precinct 3
 Franklin Precinct 9
 Franklin Precinct 4
 Lawrence Precincts 17, 34 & 20
 Lawrence Precinct 42 & Ward 27 Precincts
 15, 16, 20 & 23
 Lawrence Precincts 6, 23 & 25
 Lawrence Precinct 16
 Lawrence Precincts 1 & 13
 Lawrence Precinct 30
 Lawrence Precinct 8
 Lawrence Precinct 38
 Lawrence Precincts 12, 22 & Ward 27
 Precinct 24
 Lawrence Ward 27 Precincts 14, 18, 19, &
 21
 Warren Precincts 1, 27 & 30
 Warren Precincts 10 & 25

Warren Precinct 11 & Ward 28 Precincts 8
 & 14
 Warren Precinct 14
 Warren Precincts 15 & 22
 Warren Precinct 16
 Warren Precincts 17 & 42
 Warren Precinct 19
 Warren Precincts 2, 4, 32 & Ward 18
 Precincts 1, 2, 4, 12 & 14
 Warren Precincts 20 & 40
 Warren Precincts 23 & 38
 Warren Precinct 24
 Warren Precinct 26
 Warren Precinct 28
 Warren Precinct 29
 Warren Precincts 3, 12, & 13
 Warren Precinct 31
 Warren Precinct 33 & Ward 28 Precinct 4
 Warren Precincts 34 & 39
 Warren Precincts 35 & 43
 Warren Precincts 36 & 51
 Warren Precinct 41
 Warren Precinct 45 & Ward 28 Precincts 15
 & 22
 Warren Precinct 46 & Ward 28 Precinct 18
 Warren Precinct 48
 Warren Precincts 49 & 50
 Warren Precincts 5 & 44
 Warren Precinct 6
 Warren Precincts 7, 17, 37 & Ward 28
 Precincts 11, 17, 19, & 23
 Warren Precincts 8 & 18
 Warren Precincts 9 & 21
 Warren Ward 18 Precinct 15
 Warren Ward 18 Precinct 11
 Warren Ward 18 Precinct 3
 Warren Ward 18 Precinct 6
 Warren Ward 18 Precinct 7
 Warren Ward 18 Precinct 8
 Warren Ward 18 Precinct 5
 Warren Ward 18 Precinct 10
 Warren Ward 18 Precinct 9
 Warren Ward 18 Precinct 13
 Warren Ward 28 Precinct 25
 Warren Ward 28 Precinct 26

Warren Ward 28 Precinct 20
 Warren Ward 28 Precinct 2
 Warren Ward 28 Precinct 28
 Warren Ward 28 Precinct 3
 Warren Ward 28 Precinct 7
 Warren Ward 28 Precincts 1, 5, & 6
 Warren Ward 28 Precinct 12
 Warren Ward 28 Precinct 29
 Warren Ward 28 Precinct 9
 Warren Ward 28 Precinct 21

*As added by Acts 1981, P.L.3, SEC.1. Amended
 by Acts 1982, P.L.4, SEC.31.*

2-1-1.5-56 Fifty-First District

Sec. 56. The Fifty-First District, having
 three (3) members, consists of the following:

Marion County:

Center Ward 1 Precinct 1
 Center Ward 1 Precinct 2
 Center Ward 1 Precinct 6
 Center Ward 1 Precinct 12
 Center Ward 1 Precinct 3
 Center Ward 1 Precinct 13
 Center Ward 1 Precincts 7 & 9
 Center Ward 1 Precinct 4
 Center Ward 1 Precinct 10
 Center Ward 1 Precinct 5
 Center Ward 10 Precinct 8
 Center Ward 10 Precinct 10
 Center Ward 10 Precinct 4
 Center Ward 10 Precinct 5
 Center Ward 10 Precinct 2
 Center Ward 10 Precinct 7
 Center Ward 10 Precinct 6
 Center Ward 10 Precincts 1 & 3
 Center Ward 11 Precinct 1
 Center Ward 11 Precinct 5
 Center Ward 11 Precinct 4
 Center Ward 11 Precinct 3
 Center Ward 12 Precincts 1 & 6
 Center Ward 12 Precinct 4
 Center Ward 12 Precincts 2, 3 & 7
 Center Ward 13 Precincts 5, 12, & 13
 Center Ward 13 Precinct 11
 Center Ward 13 Precinct 1

Center Ward 13 Precincts 2, 3, & 4
 Center Ward 15 Precincts 1 & 2 & Ward 13
 Precinct 7 and Ward 16 Precincts 1 & 5

Center Ward 16 Precinct 11
 Center Ward 16 Precinct 6
 Center Ward 16 Precinct 2
 Center Ward 16 Precinct 7
 Center Ward 16 Precinct 3
 Center Ward 16 Precinct 8
 Center Ward 17 Precinct 4
 Center Ward 23 Precinct 2
 Center Ward 23 Precinct 3
 Center Ward 23 Precinct 10
 Center Ward 23 Precinct 4
 Center Ward 25 Precinct 2
 Center Ward 3 Precinct 1 & Ward 23
 Precincts 1, 6, 7, 8, & 9

Center Ward 3 Precinct 3
 Center Ward 3 Precinct 6
 Center Ward 3 Precinct 4
 Center Ward 3 Precinct 7
 Center Ward 4 Precinct 8
 Center Ward 4 Precinct 4
 Center Ward 4 Precinct 2
 Center Ward 4 Precinct 1
 Center Ward 4 Precinct 3
 Center Ward 4 Precinct 6
 Center Ward 4 Precincts 5 & 7
 Center Ward 5 Precinct 6
 Center Ward 5 Precinct 4
 Center Ward 5 Precinct 2
 Center Ward 5 Precinct 1
 Center Ward 5 Precincts 5 & 7
 Center Ward 5 Precinct 3
 Center Ward 6 Precincts 2 & 7
 Center Ward 6 Precinct 3
 Center Ward 6 Precinct 4
 Center Ward 6 Precinct 1
 Center Ward 6 Precinct 6
 Center Ward 6 Precinct 5
 Center Ward 6 Precincts 8 & 10
 Center Ward 6 Precinct 9
 Center Ward 7 Precinct 4 & Ward 3 Pre-
 cinct 2
 Center Ward 7 Precinct 1

Center Ward 7 Precinct 5
 Center Ward 7 Precinct 2
 Center Ward 7 Precinct 3
 Center Ward 8 Precinct 3
 Center Ward 8 Precincts 4 & 5 & Ward 23
 Precinct 5
 Center Ward 8 Precinct 1
 Center Ward 8 Precinct 2 & Ward 3 Pre-
 cinct 5
 Lawrence Precinct 15 & Ward 27 Precinct 2
 Lawrence Ward 27 Precinct 3
 Lawrence Ward 27 Precinct 5
 Lawrence Ward 27 Precincts 9 & 27
 Lawrence Ward 27 Precincts 1 & 10
 Warren Ward 28 Precincts 10 & 24
 Warren Ward 28 Precinct 13
 Warren Ward 28 Precinct 16
 Washington Ward 20 Precinct 11
 Wayne Ward 19 Precinct 5
 Wayne Ward 19 Precinct 4
 Wayne Ward 19 Precinct 3
 Wayne Ward 19 Precincts 11 & 12
 Wayne Ward 19 Precinct 6
 Wayne Ward 19 Precinct 1
 Wayne Ward 19 Precinct 9 & Ward 24
 Precinct 3
 Wayne Ward 19 Precinct 2
 Wayne Ward 19 Precinct 10
 Wayne Ward 29 Precincts 1, 2, 3, 4, 17, & 27

*As added by Acts 1981, P.L.3, SEC.1. Amended
 by Acts 1982, P.L.4, SEC.32.*

2-1-1.5-57 Fifty-Second District

Sec. 57. The Fifty-Second District, having
 three (3) members, consists of the following:

Johnson County:

White River 2
 White River 5
 White River 1, 3, 4 & 6

Marion County:

Center Outside Precincts 2 & 3
 Center Outside Precinct 1
 Center Ward 13 Precinct 6
 Center Ward 13 Precincts 8 & 9
 Center Ward 13 Precinct 10

Center Ward 14 Precinct 2
 Center Ward 17 Precinct 8
 Center Ward 17 Precincts 1 & 2 & Ward 16
 Precincts 4 & 10
 Center Ward 17 Precinct 7
 Center Ward 17 Precinct 6
 Center Ward 17 Precinct 10
 Center Ward 17 Precincts 3 & 9
 Center Ward 30 Precinct 4
 Center Ward 30 Precinct 1
 Center Ward 30 Precinct 9
 Center Ward 30 Precincts 2 & 5 & Ward 17
 Precinct 5
 Center Ward 30 Precinct 6
 Center Ward 30 Precinct 11
 Center Ward 30 Precinct 10
 Center Ward 30 Precincts 7 & 8
 Center Ward 30 Precinct 12
 Decatur Precincts 1, 8 & 12
 Decatur Precinct 16
 Decatur Precincts 11 & 14
 Decatur Precinct 10
 Decatur Precincts 2, 4, 5, 7, 9, 13, 15, 17, &
 18
 Decatur Precinct 3
 Decatur Precinct 6
 Franklin Precinct 14
 Franklin Precinct 5
 Franklin Precincts 13 & 15
 Franklin Precinct 7
 Perry Precincts 1 & 12
 Perry Precinct 10
 Perry Precinct 11
 Perry Precinct 13 & Ward 26 Precinct 6
 Perry Precinct 14
 Perry Precinct 15
 Perry Precincts 16, 23, & 50
 Perry Precinct 17
 Perry Precinct 18
 Perry Precincts 19 & 64
 Perry Precinct 2
 Perry Precinct 20
 Perry Precinct 21
 Perry Precinct 22
 Perry Precinct 24

Perry Precinct 25
 Perry Precinct 26
 Perry Precincts 27 & 43
 Perry Precinct 28
 Perry Precincts 29 & 49
 Perry Precinct 3
 Perry Precinct 30
 Perry Precinct 31
 Perry Precinct 32
 Perry Precinct 33
 Perry Precincts 34 & 57
 Perry Precinct 36
 Perry Precinct 37
 Perry Precinct 38
 Perry Precinct 39
 Perry Precinct 4
 Perry Precinct 40
 Perry Precincts 41 & 51
 Perry Precinct 42
 Perry Precinct 44
 Perry Precinct 45
 Perry Precinct 46
 Perry Precinct 47
 Perry Precinct 48
 Perry Precincts 5 & 35
 Perry Precinct 53
 Perry Precincts 54, 59 & 66
 Perry Precinct 56
 Perry Precinct 58
 Perry Precincts 6 & 65
 Perry Precinct 60
 Perry Precinct 61 & Center Ward 26 Precinct 1
 Perry Precinct 62
 Perry Precinct 63 & Ward 26 Precincts 4 & 5
 Perry Precinct 67
 Perry Precinct 68
 Perry Precinct 7
 Perry Precinct 8
 Perry Precincts 9, 52, & 55
 Perry Ward 26 Precinct 2
 Perry Ward 26 Precinct 3
 Wayne Precinct 16
 Wayne Precinct 24

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.33.

2-1-1.5-58 Fifty-Third District

Sec. 58. The Fifty-Third District, having one (1) member, consists of the following:

Hancock County—All except Green and Brandywine Townships
 Rush County:
 Ripley Twp.
 Center Twp.
 Washington Twp.
 Jackson Twp.
 Union Twp.
 Rushville Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-59 Fifty-Fourth District

Sec. 59. The Fifty-Fourth District, having one (1) member, consists of the following:

Henry County—All except Stoney Creek and Blue River Townships
 Wayne County:
 Jefferson Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-60 Fifty-Fifth District

Sec. 60. The Fifty-Fifth District, having one (1) member, consists of the following:

Wayne County:
 New Garden Twp.
 Green Twp.
 Webster Twp.
 Clay Twp.
 Harrison Twp.
 Jackson Twp.
 Washington Twp.
 Abington Twp.
 Boston Twp.

Fayette County—All except Orange Twp.

Union County—All

Franklin County:

Posey Twp.
 Laurel Twp.
 Blooming Grove Twp.
 Fairfield Twp.

Bath Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.34.

2-1-1.5-61 Fifty-Sixth District

Sec. 61. The Fifty-Sixth District, having one (1) member, consists of the following:

Wayne County:
 Wayne Twp.
 Center Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-62 Fifty-Seventh District

Sec. 62. The Fifty-Seventh District, having one (1) member, consists of the following:

Hancock County:
 Brandywine Twp.
 Rush County:
 Posey Twp.
 Walker Twp.
 Orange Twp.
 Anderson Twp.
 Richland Twp.
 Noble Twp.

Bartholomew County:

Flat Rock Twp.
 Haw Creek Twp.
 Shelby County—All
 Fayette County:
 Orange Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.35.

2-1-1.5-63 Fifty-Eighth District

Sec. 63. The Fifty-Eighth District, having one (1) member, consists of the following:

Johnson County:
 Pleasant Twp.
 Clark Twp.
 Needham Twp.
 Franklin Twp.
 Blue River Twp.
 Nineveh Twp.
 Hensley Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-64 Fifty-Ninth District

Sec. 64. The Fifty-Ninth District, having one (1) member, consists of the following:

Bartholomew County:

German Twp.
 Nineveh Twp.
 Union Twp.
 Harrison Twp.
 Columbus Twp.
 Clay Twp.
 Clifty Twp.
 Ohio Twp.
 Sand Creek Twp.
 Rock Creek Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-65 Sixtieth District

Sec. 65. The Sixtieth District, having one (1) member, consists of the following:

Brown County—All
 Monroe County:

Benton Twp.
 Clear Creek Twp.
 Indian Creek Twp.
 Perry Precinct 13
 Perry Precinct 17
 Perry Precincts 3 & 4
 Perry Precincts 9 & 10

Perry Precinct 12: only those portions that fall within Census Tracts 10, 11 & 3.02 but not that portion that falls within Census Tract 4.

Polk Twp.
 Richland Twp.
 Saltcreek Twp.
 VanBuren Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.36.

2-1-1.5-66 Sixty-First District

Sec. 66. The Sixty-First District, having one (1) member, consists of the following:

Monroe County:
 Bloomington Precincts 5 & 14
 Bloomington Precincts 4 & 10

Bloomington Precincts 1, 2, 3, 13, & 18
 Bloomington Precinct 16
 Bloomington Precinct 15
 Bloomington Precinct 9
 Bloomington Precinct 17
 Bloomington Precinct 19
 Bloomington Precinct 12
 Bloomington Precinct 11
 Bloomington Precincts 6, 7 & 8
 Perry Precinct 11
 Perry Precinct 12: only that portion that falls within Census Tract 4
 Perry Precinct 16
 Perry Precinct 2
 Perry Precinct 5
 Perry Precinct 6
 Perry Precincts 7 & 15
 Perry Precinct 8
 Perry Precincts 1 & 14
 Washington Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.37.

2-1-15-67 Sixty-Second District

Sec. 67. The Sixty-Second District, having one (1) member, consists of the following:

Greene County—All except Wright, Smith, and Jefferson Townships

Daviess County:

Elmore Twp.
 Madison Twp.
 Van Buren Twp.
 Bogard Twp.
 Steele Twp.

Martin County:

Micheltree Twp.
 Halbert Twp.
 Lost River Twp.

Lawrence County:

Spice Valley Twp.

Orange County—All except Northeast Township

As added by Acts 1981, P.L.3, SEC.1.

1 and Code—4

2-1-15-68 Sixty-Third District

Sec. 68. The Sixty-Third District, having one (1) member, consists of the following:

Martin County:

Perry Twp.
 Center Twp.
 Rutherford Twp.

Daviess County:

Washington Twp.
 Barr Twp.
 Veale Twp.
 Harrison Twp.
 Reeve Twp.

Dubois County:

Boone Twp.
 Harbison Twp.
 Madison Twp.
 Cass Twp.

Patoka Twp.
 Columbia Twp.

Gibson County:

Washington Twp.

Pike County:

Washington Twp.
 Jefferson Twp.
 Marion Twp.
 Lockhart Twp.
 Monroe Twp.
 Patoka Twp.
 Clay Twp.
 Madison Twp.
 Logan Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.38.

2-1-15-69 Sixty-Fourth District

Sec. 69. The Sixty-Fourth District, having one (1) member, consists of the following:

Knox County:

Vincennes Twp.
 Decker Twp.

Gibson County:

White River Twp.
 Columbia Twp.
 Center Twp.

Patoka Twp.
 Montgomery Twp.
 Wabash Twp.
 Union Twp.

Posey County:

Bethel Twp.
 Smith Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.39.

2-1-15-70 Sixty-Fifth District

Sec. 70. The Sixty-Fifth District, having one (1) member, consists of the following:

Lawrence County—All except Spice Valley Township

Orange County:

Northeast Twp.

Jackson County:

Carr Twp.

Washington County:

Brown Twp.
 Jefferson Twp.
 Monroe Twp.
 Washington Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-15-71 Sixty-Sixth District

Sec. 71. The Sixty-Sixth District, having one (1) member, consists of the following:

Bartholomew County:

Jackson Twp.
 Wayne Twp.

Jackson County—All except Redding and Carr Townships

Clark County:

Bethlehem Twp.
 Owen Twp.
 Oregon Twp.
 Charlestown Twp.
 Union Twp.
 Washington Twp.

Jennings County:

Marion Twp.

Scott County:

Lexington Twp.

Johnson Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.40.

2-1-15-72 Sixty-Seventh District

Sec. 72. The Sixty-Seventh District, having one (1) member, consists of the following:

Jackson County:

Redding Twp.

Jennings County:

Geneva Twp.
 Sand Creek Twp.
 Columbia Twp.

Franklin County:

Salt Creek Twp.
 Ray Twp.

Decatur County—All

Ripley County—All except Washington, Johnson, and Brown Townships

As added by Acts 1981, P.L.3, SEC.1.

2-1-15-73 Sixty-Eighth District

Sec. 73. The Sixty-Eighth District, having one (1) member, consists of the following:

Franklin County:

Metamora Twp.
 Brookville Twp.
 Springfield Twp.
 Whitewater Twp.
 Highland Twp.
 Butler Twp.

Ripley County:

Washington Twp.
 Switzerland County:
 Cotton Twp.
 Posey Twp.
 York Twp.

Ohio County—All

Dearborn County—All

As added by Acts 1981, P.L.3, SEC.1.

2-1-15-74 Sixty-Ninth District

Sec. 74. The Sixty-Ninth District, having one (1) member, consists of the following:

Ripley County:

Johnson Twp.
Brown Twp.
Jennings County:

Campbell Twp.
Center Twp.
Vernon Twp.
Bigger Twp.
Lovett Twp.
Montgomery Twp.
Spencer Twp.
Switzerland County:

Pleasant Twp.
Jefferson Twp.
Craig Twp.

Jefferson County—All
As added by Act 1981, P.L.3, SEC.1.

2-1-1.5-75 Seventieth District

Sec. 75. The Seventieth District, having one (1) member, consists of the following:

Scott County:

Vienna Twp.

Clark County:

Carr Twp.

Monroe Twp.

Silver Creek Twp.

Wood Twp.

Floyd County:

Franklin Twp.

Greenville Twp.

New Albany Precinct 32

Harrison County:

Taylor Twp.

Posey Twp.

Boone Twp.

Heth Twp.

Washington Twp.

Webster Twp.

Harrison Twp.

Jackson Twp.

Franklin Twp.

Spencer Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended
by Acts 1982, P.L.4, SEC.41.

2-1-1.5-76 Seventy-First District

Sec. 76. The Seventy-First District, having one (1) member, consists of the following:

Clark County:

Jeffersonville Precinct 3

Jeffersonville Precincts 31, 33, 34 & 37

Jeffersonville Precincts 9, 13 & 14

Jeffersonville Precinct 39

Jeffersonville Precinct 5

Jeffersonville Precincts 35, 36 & 38

Jeffersonville Precinct 23

Jeffersonville Precincts 4, 6, 8 & 10

Jeffersonville Precincts 20 & 21

Jeffersonville Precinct 7

Jeffersonville Precincts 26, 27 & 28

Jeffersonville Precincts 11 & 12

Jeffersonville Precincts 24 & 25

Jeffersonville Precinct 22

Utica Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-77 Seventy-Second District

Sec. 77. The Seventy-Second District, having one (1) member, consists of the following:

Floyd County:

Georgetown Twp.

Lafayette Twp.

New Albany Precinct 5

New Albany Precincts 1, 4, 6, 7 & 8

New Albany Precincts 19, 20 & 29

New Albany Precinct 2

New Albany Precinct 13

New Albany Precincts 3 & 11

New Albany Precincts 25 & 26

New Albany Precinct 10

New Albany Precinct 23

New Albany Precinct 15

New Albany Precinct 28

New Albany Precinct 33

New Albany Precinct 9

New Albany Precincts 21 & 22

New Albany Precinct 14

New Albany Precinct 27

New Albany Precinct 12

New Albany Precinct 24

New Albany Precincts 16, 17 & 18

New Albany Township 30 & 31

Clark County:

Jeffersonville Precincts 1 & 2

Jeffersonville Precincts 30 & 32

As added by Acts 1981, P.L.3, SEC.1. Amended
by Acts 1982, P.L.4, SEC.42.

2-1-1.5-78 Seventy-Third District

Sec. 78. The Seventy-Third District, having one (1) member, consists of the following:

Harrison County:

Morgan Twp.

Blue River Twp.

Crawford County—All

Perry County—All except Troy Twp.

Dubois County:

Hall Twp.

Jefferson Twp.

Jackson Twp.

Bainbridge Twp.

Marion Twp.

Scott County:

Finley Twp.

Jennings Twp.

Washington County:

Vernon Twp.

Madison Twp.

Howard Twp.

Pierce Twp.

Polk Twp.

Franklin Twp.

Gibson Twp.

Jackson Twp.

Posey Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended
by Acts 1982, P.L.4, SEC.43.

2-1-1.5-79 Seventy-Fourth District

Sec. 79. The Seventy-Fourth District, having one (1) member, consists of the following:

Perry County:

Troy Twp.

Dubois County:

Ferdinand Twp.

Spencer County—All except Luce Township
Warrick County:

Hart Twp.

Owen Twp.

Pigeon Twp.

Skelton Twp.

Boon Twp.

Lane Twp.

Gibson County:

Barton Twp.

Johnson Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended
by Acts 1982, P.L.4, SEC.44.

2-1-1.5-80 Seventy-Fifth District

Sec. 90. The Seventy-Fifth District, having two (2) members, consists of the following:

Warrick County:

Greer Twp.

Campbell Twp.

Ohio Twp.

Anderson Twp.

Spencer County:

Luce Twp.

Vanderburgh County:

Armstrong Twp.

Center Precincts 1, 3, 4 & 5

Center Precinct 2

Center Precinct 6

Center Precinct 7

Center Precinct 8

Evansville Ward 1 Precinct 23

Evansville Ward 1 Precinct 8

Evansville Ward 1 Precinct 11

Evansville Ward 1 Precinct 1

Evansville Ward 1 Precincts 9A & 10

Evansville Ward 1 Precincts 9B & 21

Evansville Ward 1 Precincts 16, 17, 18A & 22

Evansville Ward 1 Precincts 2, 3 & 7

Evansville Ward 1 Precinct 15

Evansville Ward 1 Precinct 18B

Evansville Ward 1 Precinct 5

Evansville Ward 2 Precinct 17

Evansville Ward 2 Precincts 1, 2A & 2B

Evansville Ward 2 Precinct 8
 Evansville Ward 2 Precinct 6
 Evansville Ward 2 Precinct 9
 Evansville Ward 2 Precinct 7
 Evansville Ward 2 Precincts 10, 12, 13 & 14
 Evansville Ward 2 Precinct 21
 Evansville Ward 3 Precincts 14, 18 & 19
 Evansville Ward 3 Precinct 5
 Evansville Ward 3 Precincts 15, 10, 11, & 17
 Evansville Ward 3 Precinct 6
 Evansville Ward 3 Precincts 3, 8, 9, 12, 13 & 16
 Evansville Ward 3 Precinct 7
 Evansville Ward 5 Precincts 1, 11 & 22
 Evansville Ward 5 Precinct 2
 Evansville Ward 5 Precincts 10, 17 & 19
 Evansville Ward 5 Precincts 12, 13, 14 & 18
 German Twp.
 Knight Precinct K2
 Knight Precinct K3
 Scott Precinct S4
 Scott Twp.

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.45.

2-1-1.5-81 Seventy-Sixth District

Sec. 81. The Seventy-Sixth District, having one (1) member, consists of the following:

Posey County—All except Bethel and Smith Townships

Vanderburgh County:

Center Precinct 9
 Evansville Ward 5 Precinct 15
 Evansville Ward 6 Precincts 16, 19, 20 & 17
 Evansville Ward 6 Precinct 4
 Evansville Ward 6 Precincts 1, 2 & 8
 Evansville Ward 6 Precinct 18
 Evansville Ward 6 Precinct 11
 Evansville Ward 6 Precinct 3
 Evansville Ward 6 Precinct 9
 Evansville Ward 6 Precinct 15
 Evansville Ward 6 Precinct 7
 Evansville Ward 6 Precinct 13
 Evansville Ward 6 Precincts 5 & 10
 Evansville Ward 6 Precincts 12, 21 & 22

Evansville Ward 6 Precinct 14
 Perry Twp.
 Pigeon Precinct A
 Pigeon Precinct B
 Union Twp.

As added by Acts 1981, P.L.3, SEC.1.

2-1-1.5-82 Seventy-Seventh District

Sec. 82. The Seventy-Seventh District, having one (1) member, consists of the following:

Vanderburgh County:

Evansville Ward 1 Precincts 4, 19 & 20
 Evansville Ward 2 Precinct 5
 Evansville Ward 2 Precincts 3, 4 & 15
 Evansville Ward 2 Precincts 16, 18, 19 & 22
 Evansville Ward 2 Precincts 11 & 20 & Ward 1 Precincts 6, 12, 13 & 14
 Evansville Ward 3 Precincts 2 & 20
 Evansville Ward 3 Precinct 1
 Evansville Ward 3 Precinct 4
 Evansville Ward 4 Precinct 2
 Evansville Ward 4 Precinct 10
 Evansville Ward 4 Precinct 4
 Evansville Ward 4 Precinct 5
 Evansville Ward 4 Precincts 1, 6, 8, 13, 14 & 15
 Evansville Ward 4 Precinct 3
 Evansville Ward 4 Precinct 7
 Evansville Ward 4 Precincts 11 & 16
 Evansville Ward 4 Precinct 12
 Evansville Ward 4 Precinct 9
 Evansville Ward 5 Precinct 20
 Evansville Ward 5 Precinct 10
 Evansville Ward 5 Precinct 3
 Evansville Ward 5 Precinct 8
 Evansville Ward 5 Precinct 4
 Evansville Ward 5 Precincts 6, 7, 9 & 21
 Evansville Ward 5 Precinct 5
 Evansville Ward 6 Precinct 6
 Knight Precinct K1
 Pigeon Precinct C

As added by Acts 1981, P.L.3, SEC.1. Amended by Acts 1982, P.L.4, SEC.46.

1981 Senate Plan, As Amended in 1982 Ind. Code §2-1-2.2

2-1-2.2-13 Eighth District
 2-1-2.2-14 Ninth District
 2-1-2.2-15 Tenth District
 2-1-2.2-16 Eleventh District
 2-1-2.2-17 Twelfth District
 2-1-2.2-18 Thirteenth District
 2-1-2.2-19 Fourteenth District
 2-1-2.2-20 Fifteenth District
 2-1-2.2-21 Sixteenth District
 2-1-2.2-22 Seventeenth District
 2-1-2.2-23 Eighteenth District
 2-1-2.2-24 Nineteenth District
 2-1-2.2-25 Twentieth District
 2-1-2.2-26 Twenty-First District
 2-1-2.2-27 Twenty-Second District
 2-1-2.2-28 Twenty-Third District
 2-1-2.2-29 Twenty-Fourth District
 2-1-2.2-30 Twenty-Fifth District
 2-1-2.2-31 Twenty-Sixth District
 2-1-2.2-32 Twenty-Seventh District
 2-1-2.2-33 Twenty-Eighth District
 2-1-2.2-34 Twenty-Ninth District
 2-1-2.2-35 Thirtieth District
 2-1-2.2-36 Thirty-First District
 2-1-2.2-37 Thirty-Second District
 2-1-2.2-38 Thirty-Third District
 2-1-2.2-39 Thirty-Fourth District
 2-1-2.2-40 Thirty-Fifth District
 2-1-2.2-41 Thirty-Sixth District
 2-1-2.2-42 Thirty-Seventh District
 2-1-2.2-43 Thirty-Eighth District
 2-1-2.2-44 Thirty-Ninth District
 2-1-2.2-45 Fortieth District
 2-1-2.2-46 Forty-First District
 2-1-2.2-47 Forty-Second District
 2-1-2.2-48 Forty-Third District
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 2-1-2.2-50 Forty-Fifth District
 2-1-2.2-51 Forty-Sixth District
 2-1-2.2-52 Forty-Seventh District
 2-1-2.2-53 Forty-Eighth District
 2-1-2.2-54 Forty-Ninth District
 2-1-2.2-55 Fiftieth District

Chapter 2.2. Senatorial Districts: 1981 Plan.

2-1-2.2-1 "County" and "township" defined: federal census and related documents incorporated by reference; precincts; descriptions and maps; establishment of new precincts
 2-1-2.2-2 Number of members and districts
 2-1-2.2-3 Senators elected in 1980; terms of office; districts represented
 2-1-2.2-4 Parts of state not included in described district or included in more than one district; disposition
 2-1-2.2-5 Application of chapter; declaration of unconstitutionality; effect
 2-1-2.2-6 First District
 2-1-2.2-7 Second District
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 2-1-2.2-9 Fourth District
 2-1-2.2-10 Fifth District
 2-1-2.2-11 Sixth District
 2-1-2.2-12 Seventh District

2-1-2.2-1 "County" and "township" defined: federal census and related documents incorporated by reference; precincts; descriptions and maps; establishment of new precincts

Sec. 1. (a) For the purposes of this chapter, the terms "county" and "township" or the common abbreviations thereof, have the same meanings and describe the same geographical boundaries as they do when used by the United States Department of Commerce, Bureau of the Census, in reporting the 1980 decennial census of the state of Indiana. In addition, the official

report and all official documents relating to the report of this census are incorporated by reference into this chapter.

(b) All other references made in the descriptions of senatorial districts in this chapter are to the precincts existing January 1, 1981, and depicted by descriptions and maps maintained by the state election board under IC 3-1-3-4. The state election board shall separately maintain and preserve those descriptions and maps of precincts existing on January 1, 1981, notwithstanding any subsequent changes in precinct boundaries. The state election board shall make the descriptions and maps referred to in this section available for public inspection during regular office hours.

(c) After August 31, 1981, existing precinct boundaries may be changed and new precincts may be established. However, no precinct may be divided by a senate district boundary. *As added by Acts 1981, P.L.4, SEC.1.*

2-1-2.2-2 Number of members and districts

Sec. 2. The senate of the Indiana general assembly consists of fifty (50) members. The senators shall be elected from fifty (50) senate districts as described in this chapter, with each district having one (1) senator. *As added by Acts 1981, P.L.4, SEC.1.*

2-1-2.2-3 Senators elected in 1980; terms of office; districts represented

Sec. 3. Each senator elected in the general election in 1980 for a full four (4) year term shall continue to hold office until the term for which he was elected has expired by limitation, and he shall represent the district established under this chapter in which his legal residence is located. *As added by Acts 1981, P.L.4, SEC.1.*

2-1-2.2-4 Parts of state not included in described district or included in more than one district; disposition

Sec. 4. (a) Any part of the state of Indiana which has not been described as included in one (1) of the districts described in this chapter is included within the district that:

(1) is contiguous to that part; and
(2) contains the least population of all districts contiguous to that part, according to the 1980 decennial census referred to in section 1 of this chapter.

(b) If any part of the state of Indiana is described in this chapter as being in more than one (1) district, it is included within the district that:

(1) is one of the districts in which that part is listed in this chapter;
(2) is contiguous to that part; and
(3) contains the least population, according to the 1980 decennial census referred to in section 1 of this chapter.

As added by Acts 1981, P.L.4, SEC.1.

2-1-2.2-5 Application of chapter; declaration of unconstitutionality; effect

Sec. 5. This chapter first applies to elections conducted in 1982, notwithstanding any other law. However, if this chapter is declared to be unconstitutional, IC 2-1-2.1 is applicable in place of this chapter. *As added by Acts 1981, P.L.4, SEC.1.*

2-1-2.2-6 First District

Sec. 6. The First District consists of the following:

Lake County:

East Chicago District 1 Precincts 1 through 9

East Chicago District 2 Precincts 1 through 9

East Chicago District 3 Precincts 1 through 9

East Chicago District 4 Precincts 1 through 10

East Chicago District 5 Precincts 1 through 9

East Chicago District 6 Precincts 1 through 9

Gary District 3 Precinct 13

Hammond District 1 Precincts 1 through 15

Hammond District 2 Precincts 1 through 16

Hammond District 3 Precincts 1 through 16

Hammond District 4 Precincts 4, 5, 11, 17, and 18

Hammond District 5 Precinct 5

Hammond District 6 Precincts 1 through 9

Whiting Precincts 1 through 10

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.1.

2-1-2.2-7 Second District

Sec. 7. The Second District consists of the following:

Lake County:

Dyer Precincts 1, 2, 4 & 5

Gary District 3 Precincts 2, 3

Gary District 6 Precinct 16

Griffith Precincts 1 through 6 and 8 through 13

Hammond District 4 Precincts 1 through 3, 6 through 10, and 12 through 16

Hammond District 5 Precincts 1 through 4 and 6 through 16

Hammond District 6 Precincts 10 through 15

Highland Precincts 1 through 19

Munster Precincts 1 through 20

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.2.

2-1-2.2-8 Third District

Sec. 8. The Third District consists of the following:

Lake County:

Gary District 1 Precincts 1 through 30

Gary District 2 Precincts 1 through 26

Gary District 3 Precincts 1, 5 through 12, and 14 through 23

Gary District 4 Precincts 1 through 25

Gary District 5 Precincts 1 and 8

Gary District 6 Precincts 4, 4A, 17, and 18

Hobart Township Precinct 5

Lake Station Precincts 2, 3, 3A, 3B, 4, 4A, 5, 5A, 7, 7A, and 7B

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.3.

2-1-2.2-9 Fourth District

Sec. 9. The Fourth District consists of the following:

Lake County:

Calumet Township Precincts 4 through 6, 10 through 12 and 14

Gary District 5 Precincts 2 through 7, and 9 through 24

Gary District 6 Precincts 1, 2, 5 through 15, and 19 through 28

Hobart City Districts 1 through 5

Hobart Township Precinct 8

Lake Station Precincts 1, 6, 8, 9, 10 and 11

Merrillville Precincts 1, 1A, 4 through 11, 14, 15, 17 through 19, 22, 22A, 23, 25, 25A, 26, and 26A

Ross Township Precincts 12 and 20

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.4.

2-1-2.2-10 Fifth District

Sec. 10. The Fifth District consists of the following:

Porter County:

Portage Twp.

Pine Twp.

Jackson Twp.

Liberty Twp.

Union Twp.

Center Twp.

Washington Twp.

Morgan Twp.

Pleasant Twp.

Westchester Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-2.2-11 Sixth District

Sec. 11. The Sixth District consists of the following:

Lake County:

Cedar Lake Precincts 1 through 7

Center Township Precincts 1 through 4

Crown Point Precincts 1 through 11

Cedar Creek Precincts 1 through 5

Dyer Precincts 3 and 6

Eagle Creek 1
 Griffith Precinct 7
 Hanover 1 through 3
 Merrillville Precincts 2, 3, 16, 21, 24, and 27
 Ross Township Precinct 13
 Schererville Precincts 1 through 4, 4A, 5 through 10, 10A, 11, 11A, and 12
 St. John Town Precincts 1, 1A & 2
 St. John Township Precincts 1 through 3, 3A, and 4 through 6
 West Creek 1 through 3
 Winfield 1
 Porter County:
 Porter Twp.
 Boone Twp.
 Newton County:
 Lake Twp.
 Lincoln Twp.
 McClellan Twp.
 Colfax Twp.
 Beaver Twp.
 Jackson Twp.

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.5!

2-1-22-12 Seventh District

Sec. 12. The Seventh District consists of the following:

Newton County:
 Washington Twp.
 Iroquois Twp.
 Jefferson Twp.
 Grant Twp.
 Benton County—All
 Warren County:
 Kent Twp.
 Steuben Twp.
 Pike Twp.
 Jordan Twp.
 Liberty Twp.
 Prairie Twp.
 Pine Twp.
 Adams Twp.
 Jasper County—All
 Pulaaki County—All

Starke County:

Jackson Twp.
 Center Twp.
 Washington Twp.
 Railroad Twp.
 Wayne Twp.
 California Twp.
 North Bend Twp.

Tippecanoe County:

Shelby Twp.
 White County:
 Monon Twp.
 Liberty Twp.
 Cass Twp.
 Princeton Twp.
 Honey Creek Twp.
 Union Twp.
 Lincoln Twp.
 West Point Twp.
 Big Creek Twp.
 Round Grove Twp.
 Prairie Twp.

Carroll County:

Jefferson Twp.
 Adams Twp.
 Tippecanoe Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-22-13 Eighth District

Sec. 13. The Eighth District consists of the following:

LaPorte County:

Michigan Twp.
 Springfield Twp.
 Galena Twp.
 Cool Spring Twp.
 Center Twp.
 Kankakee Twp.
 New Durham Twp.
 Scipio Twp.
 Pleasant Twp.
 Clinton Twp.
 Noble Twp.
 Washington Twp.
 Union Twp.

Hanna Twp.
 Cass Twp.
 Dewey Twp.
 Prairie Twp.
 Starke County:
 Davis Twp.
 Oregon Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-22-14 Ninth District

Sec. 14. The Ninth District consists of the following:

LaPorte County:

Hudson Twp.
 Wills Twp.
 Lincoln Twp.
 Johnson Twp.

St. Joseph County:

Center Precincts 1 through 9
 German Precincts 2 through 4
 Greene Precincts 1 and 2
 Liberty 1 through 3
 Lincoln 1 through 3
 Olive 1 through 3
 Mishawaka Election District 1 Precinct 8
 Mishawaka Election District 2 Precinct 7
 Madison 1 & 2
 Penn Precincts 3, 8, 9, and 14
 Portage Precincts 2, 4, and 6
 South Bend Election District 1, Precinct 3
 South Bend Election District 5 Precincts 10, 13, 14, 16 through 26
 Union 1 & 2
 Warren Precincts 1 through 4
 Marshall County—All
 Kosciusko County:
 Scott Twp.
 Jefferson Twp.
 Etna Twp.
 Prairie Twp.
 Harrison Twp.
 Franklin Twp.
 Seward Twp.

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.6.

2-1-22-15 Tenth District

Sec. 15. The Tenth District consists of the following:

St. Joseph County:

Clay Precinct 2
 Mishawaka Election District 1 Precincts 1 through 5 and 7
 Mishawaka Election District 2 Precincts 1 through 6
 Mishawaka Election District 3 Precinct 7
 Mishawaka Election District 4 Precincts 1, 2, and 7
 Penn Precinct 13
 Portage Precincts 3 and 5
 South Bend Election District 1 Precincts 1, 2, 4 through 11, and 13 through 19
 South Bend Election District 2 Precincts 1 through 16, 16A, and 17 through 21
 South Bend Election District 3 Precincts 2 through 19
 South Bend Election District 4 Precincts 3 through 5, 7 through 9, 11 through 22, and 25
 South Bend Election District 5 Precincts 5 through 9, 11, 12, and 15
 South Bend Election District 6 Precincts 5 through 25

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.7.

2-1-22-16 Eleventh District

Sec. 16. The Eleventh District consists of the following:

Elkhart County:

Cleveland Precincts 79 through 81
 Concord Precinct 41
 Osolo Precincts 29, 38 through 40, and 63 through 67

St. Joseph County:

Clay Precincts 1 and 3 through 19
 German Precinct 1
 Harris Precincts 1 through 3
 Mishawaka Election District 3 Precincts 1 through 4, 4A, 5, 6, and 8
 Mishawaka Election District 4 Precincts 3 through 6 and 8

Mishawaka Election District 5 Precincts 2 through 8

Mishawaka Election District 6 Precincts 1 and 3 through 8

Penn Precincts 1, 2, 4 through 7, and 10 through 12

South Bend Election District 1 Precincts 12 and 12A

South Bend Election District 4 Precincts 6, 10, 23, and 24

Portage Precincts 1 & 1A

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.8.

2-1-23-17 Twelfth District

Sec. 17. The Twelfth District consists of the following:

Elkhart County:

Washington Twp.

York Twp.

Concord Twp., except Precinct 41

Jefferson Twp.

Middlebury Twp.

Olive Twp.

Harrison Twp.

Elkhart Twp.

Clinton Twp.

Locke Twp.

Union Twp.

Jackson Twp.

Benton Twp.

Baugo Twp.

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.9.

2-1-23-18 Thirteenth District

Sec. 18. The Thirteenth District consists of the following:

LaGrange County—All

Noble County:

Jefferson Twp.

Perry Twp.

Elkhart Twp.

Orange Twp.

Wayne Twp.

Sparta Twp.

York Twp.

Albion Twp.

Allen Twp.

Washington Twp.

Noble Twp.

Green Twp.

DeKalb County:

Fairfield Twp.

Richland Twp.

Keyser Twp.

Butler Twp.

Kosciusko County:

Van Buren Twp.

Turkey Creek Twp.

Plain Twp.

Tippecanoe Twp.

Wayne Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-23-19 Fourteenth District

Sec. 19. The Fourteenth District consists of the following:

Steuben County—All

DeKalb County:

Smithfield Twp.

Franklin Twp.

Troy Twp.

Grant Twp.

Wilmington Twp.

Stafford Twp.

Union Twp.

Jackson Twp.

Concord Twp.

Spencer Twp.

Newville Twp.

Allen County:

Adams A through G

Adams 256

Cedar Creek A through C

Fort Wayne 108, 111, 112, 160, 161, 162, 251, 252, and 255

Jackson

Jefferson

Madison

Marion A & B

Maumee & Maumee Woodburn

Milan

Monroe

New Haven 1 through 4

Perry A through E

Scipio

Springfield

St. Joe 260 through 262 and 265

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.10.

2-1-23-20 Fifteenth District

Sec. 20. The Fifteenth District consists of the following:

Allen County:

Fort Wayne 101, 102, 104 through 107, 109, 110, 151, 154 through 158, 201 through 207, 209, 210, 250, 253, 254, 301 through 303, 350 through 353, 359, 404, 505, 506, 601, 602, 606, and 608

St. Joe A, B-1, B-2, C, D, E-1, E-2, F, G, H-1, H-2, J-1, J-2, K-1, K-2, L, M, N, O-1, O-2, P, Q, R-1, and R-2

St. Joe 208, 211 through 214, 257 through 259, 263, 264, 309, and 310

Washington A through G

Washington 304 through 308, 311, and 360 through 362

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.11.

2-1-23-21 Sixteenth District

Sec. 21. The Sixteenth District consists of the following:

Allen County:

Aboite A through H

Adams H, J, and K

Adams 610 through 612 and 656 through 662

Fort Wayne 150, 152, 153, 354 through 358, 402, 403, 405, 407 through 414, 450 through 460, 501 through 504, 507 through 510, 512, 513, 550 through 560, 603 through 605, 607, 609, and 650 through 655

Pleasant A and B

Washington 401

Wayne A through D and F

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.12.

2-1-23-22 Seventeenth District

Sec. 22. The Seventeenth District consists of the following:

Noble County:

Swan Twp.

Whitley County—All

Kosciusko County:

Clay Twp.

Monroe Twp.

Washington Twp.

Lake Twp.

Jackson Twp.

Wabash County—All

Huntington County:

Warren Twp.

Clear Creek Twp.

Andrews Twp.

Huntington Twp.

Jackson Twp.

Allen County:

Eel River Twp.

Lake Twp.

Lafayette Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-23-23 Eighteenth District

Sec. 23. The Eighteenth District consists of the following:

Fulton County—All

Miami County—All

Cass County—All

White County:

Jackson Twp.

Carroll County:

Rock Creek Twp.

Liberty Twp.

Washington Twp.

Deer Creek Twp.

Jackson Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-22-24 Nineteenth District

Sec. 24. The Nineteenth District consists of the following:

Adams County—All
Wells County—All
Jay County:

Penn Twp.
Jackson Twp.
Bear Creek Twp.
Wabash Twp.
Noble Twp.
Wayne Twp.
Greene Twp.
Knox Twp.
Richland Twp.

Huntington County:
Union Twp.

Rock Creek Twp.
Lancaster Twp.
Polk Twp.
Wayne Twp.
Jefferson Twp.
Salomonie Twp.

Blackford County—All

Delaware County:
Washington Twp.
Union Twp.
Niles Twp.

Grant County:
Van Buren Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-22-25 Twentieth District

Sec. 25. The Twentieth District consists of the following:

Madison County:
Duck Creek Twp.
Boone Twp.
Van Buren Twp.
Pipe Creek Twp.
Monroe Twp.

Grant County:
Richland Twp.
Pleasant Twp.
Washington Twp.

Sims Twp.
Franklin Twp.
Center Twp.
Monroe Twp.
Mill Twp.
Green Twp.
Liberty Twp.
Fairmount Twp.
Jefferson Twp.

Howard County:
Union Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-22-26 Twenty-First District

Sec. 26. The Twenty-First District consists of the following:

Howard County:

Clay Twp.
Howard Twp.
Liberty Twp.
Jackson Twp.
Ervin Twp.
Taylor Twp.
Harrison Twp.
Center Twp.

Tipton County—All

Hamilton County:
Jackson Twp.
White River Twp.
Wayne Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-22-27 Twenty-Second District

Sec. 27. The Twenty-Second District consists of the following:

Tippecanoe County:
Wabash Twp.
Tippecanoe Twp.
Fairfield Twp.
Union Twp.
Wea Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-22-28 Twenty-Third District

Sec. 28. The Twenty-Third District consists of the following:

Montgomery County—All except Scott, Clark and Walnut Twps.

Clinton County—All

Howard County:

Monroe Twp.
Honey Creek Twp.
Carroll County:
Madison Twp.
Monroe Twp.
Carrollton Twp.
Burlington Twp.
Democrat Twp.
Clay Twp.

Tippecanoe County:

Washington Twp.
Perry Twp.
Sheffield Twp.
Lauramie Twp.
Randolph Twp.
Jackson Twp.
Wayne Twp.

Fountain County—All

Vermillion County:
Highland Twp.
Eugene Twp.

Warren County:

Washington Twp.
Mound Twp.
Warren Twp.
Medina Twp.

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1981, P.L.18, SEC.2

2-1-22-29 Twenty-Fourth District

Sec. 29. The Twenty-Fourth District consists of the following:

Hamilton County:
Adams Twp.
Washington Twp.
Noblesville Twp.

Boone County:

Washington Twp.
Clinton Twp.
Marion Twp.
Center Twp.

Jefferson Twp.
Jackson Twp.
Harrison Twp.
Sugar Creek Twp.

Hendricks County:

Eel River Twp.
Union Twp.
Middle Twp.
Brown Twp.
Lincoln Twp.
Washington Twp.
Center Twp.
Marion Twp.

Putnam County:

Franklin Twp.
Jackson Twp.
Floyd Twp.

Montgomery County:

Scott Twp.
Clark Twp.
Walnut Twp.

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1981, P.L.18, SEC.3

2-1-22-30 Twenty-Fifth District

Sec. 30. The Twenty-Fifth District consists of the following:

Delaware County:

Hamilton Twp.
Harrison Twp.
Center Twp. Precinct 47
Mt. Pleasant Twp. Precinct 55, 71, & 74

Madison County:

Jackson Twp.
Lafayette Twp.
Richland Twp.
Stony Creek Twp.
Anderson Twp.
Union Twp.

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.13.

2-1-22-31 Twenty-Sixth District

Sec. 31. The Twenty-Sixth District consists of the following:

Henry County:

Fall Creek Twp.
Jefferson Twp.

Delaware County:

Mt. Pleasant Twp. Precinct 53, 54, & 72
Salem Twp.
Monroe Twp.
Perry Twp.
Center Twp., except precinct 47
Liberty Twp.
Delaware Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-23-32 Twenty-Seventh District

Sec. 32. The Twenty-Seventh District consists of the following:

Randolph County—All

Jay County:

Jefferson Twp.
Pike Twp.
Madison Twp.

Wayne County—All

As added by Acts 1981, P.L.4, SEC.1.

2-1-23-33 Twenty-Eighth District

Sec. 33. The Twenty-Eighth District consists of the following:

Hancock County—All

Madison County:

Green Twp.
Fall Creek Twp.
Adams Twp.

Henry County:

Prairie Twp.
Stony Creek Twp.
Blue River Twp.
Harrison Twp.
Henry Twp.
Liberty Twp.
Greensboro Twp.
Wayne Twp.
Spiceland Twp.
Franklin Twp.
Dudley Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-23-34 Twenty-Ninth District

Sec. 34. The Twenty-Ninth District consists of the following:

Boone County:

Eagle Township
Perry Township
Union Township
Worth Township

Hamilton County:

Clay Township

Marion County:

Pike Precincts 1 through 8, 11, 14 through 16, and 20 through 22

Pike Ward 32 Precincts 1 through 5
Washington Precincts 2, 7, 12, 13, 22, 26, 29, 33, 34, 43, 46, 53, 63, 67 through 69, 73, and 74

Washington Ward 21 Precincts 11, 12, and 19

Wayne Precincts 2, 17, 19, 31, 46, and 50
Wayne Ward 29 Precincts 5 through 12, 14, 16, 19, 21, 22, 24, 25, 29, and 30

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.14.

2-1-23-35 Thirtieth District

Sec. 35. The Thirtieth District consists of the following:

Marion County:

Pike Precincts 9, 10, 12, 13, and 17 through 19

Washington Precincts 1, 3 through 6, 8 through 11, 14 through 21, 23 through 25, 27, 28, 30 through 32, 35 through 42, 44, 45, 47 through 52, 54 through 62, 64 through 66, 70 through 72, and 75 through 77

Washington Ward 20 Precincts 1 through 10, 12, and 13

Washington Ward 21 Precincts 1 through 10, 13 through 18, and 20 through 23

Washington Ward 22 Precincts 1 through 4, and 6 through 14

Washington Ward 31 Precincts 1 through 3, 6, 8, and 9

Wayne Ward 29 Precinct 23

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.15.

2-1-23-36 Thirty-First District

Sec. 36. The Thirty-First District consists of the following:

Hamilton County:

Fall Creek East & West
North Delaware
South Delaware

Marion County:

Lawrence Precincts 1 through 44
Lawrence Ward 27 Precincts 1 through 21 and 23 through 27
Warren Precincts 7, 11, 31, 33, 37, and 45
Warren Ward 28 Precincts 1, 2, 4 through 9, 11 through 17, 19, 21 through 23, and 25

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.16.

2-1-23-37 Thirty-Second District

Sec. 37. The Thirty-Second District consists of the following:

Johnson County:

Clark 1
Needham 1

Marion County:

Center Outside Precincts 1 through 4
Center Ward 9 Precincts 7 through 9 and 14
Center Ward 25 Precincts 3, 4, 6, 8 through 12, and 14
Center Ward 30 Precinct 9
Franklin Twp.
Perry Precincts 1, 2, 12, 16, 23 through 25, 31, 32, 38, 42, 50, 53
Warren Precincts 1 through 6, 8 through 10, 12 through 30, 32, 34 through 36, 38 through 44, 46, and 48 through 51
Warren Ward 18 Precincts 1 through 15
Warren Ward 28 Precincts 3, 18, 20, 26, 28, and 29

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.17.

2-1-23-38 Thirty-Third District

Sec. 38. The Thirty-Third District consists of the following:

Marion County:

Center Ward 2 Precincts 1 and 5
Center Ward 3 Precincts 3 through 7
Center Ward 4 Precinct 8
Center Ward 5 Precincts 1 and 6
Center Ward 6 Precincts 2 through 7 and 9
Center Ward 7 Precincts 1 through 3 and 5
Center Ward 8 Precincts 1 through 5
Center Ward 10 Precincts 1 through 3 and 5
Center Ward 11 Precincts 1 and 3 through 5
Center Ward 12 Precincts 1 through 4, 6, and 7
Center Ward 13 Precincts 2 through 5, 7, and 11 through 13
Center Ward 14 Precincts 1 through 6
Center Ward 15 Precincts 1 and 2
Center Ward 16 Precincts 1, 2, 4, 5, 7, 8, 10, 11
Center Ward 17 Precincts 1, 2, and 4
Center Ward 23 Precinct 5
Wayne Precincts 5, 15, 25, 37, and 66
Wayne Ward 19 Precincts 1 through 12
Wayne Ward 24 Precincts 1 through 7
Wayne Ward 29 Precincts 1 through 4, 15, 17, 26, and 27

As added by Acts 1981, P.L.1, SEC.1. Amended by Acts 1982, P.L.5, SEC.18.

2-1-23-39 Thirty-Fourth District

Sec. 39. The Thirty-Fourth District consists of the following:

Marion County:

Center Ward 1 Precincts 1 through 7, 9, 10, 12, and 13
Center Ward 2 Precincts 2 through 4 and 6 through 11
Center Ward 3 Precincts 1 and 2
Center Ward 4 Precincts 1 through 7
Center Ward 5 Precincts 2 through 5 and 7
Center Ward 6 Precincts 1, 8, and 10
Center Ward 7 Precinct 4
Center Ward 9 Precincts 1 through 6, 10 through 13, and 15 through 17
Center Ward 10 Precincts 4 and 6 through 10
Center Ward 16 Precincts 3 and 6

Center Ward 17 Precincts 3 and 6 through 9
 Center Ward 23 Precincts 1 through 4 and 6 through 10
 Center Ward 25 Precincts 1, 2, 5, 7, and 13
 Warren Ward 28 Precinct 10 & 24
 Washington Ward 20 Precinct 11
 Washington Ward 31 Precinct 4, 5, & 7

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.19.

2-1-23-40 Thirty-Fifth District

Sec. 40. The Thirty-Fifth District consists of the following:

Hendricks County:
 Guilford Township—
 Marion County:
 Decatur Twp.

Wayne Precincts 1, 3, 4, 6 through 14, 16, 18, 20 through 24, 26 through 30, 32 through 36, 38 through 45, 47 through 49, 51 through 65, and 67 through 73

Wayne Ward 29 Precincts 13, 18, 20, and 28

Morgan County:
 Brown Township

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.20.

2-1-23-41 Thirty-Sixth District

Sec. 41. The Thirty-Sixth District consists of the following:

Johnson County:
 Pleasant Precincts 1 through 14
 White River 5

Marion County:
 Center Ward 13 Precincts 1, 6, and 8 through 10

Center Ward 17 Precincts 5 and 10

Center Ward 26 Precinct 1

Center Ward 30 Precincts 1, 2, 4 through 8, and 10 through 12

Perry Precincts 3 through 11 13 through 15, 17 through 22, 26 through 30, 33 through 37, 39 through 41, 43 through 49, 51, 52, and 54 through 68

Perry Ward 26 Precincts 2 through 6

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.21.

2-1-23-42 Thirty-Seventh District

Sec. 42. The Thirty-Seventh District consists of the following:

Hendricks County:

Clay Twp.
 Liberty Twp.
 Franklin Twp.

Morgan County:

Adams Twp.
 Monroe Twp.
 Gregg Twp.
 Clay Twp.
 Madison Twp.
 Harrison Twp.
 Greene Twp.
 Jackson Twp.
 Washington Twp.
 Jefferson Twp.
 Baker Twp.
 Ray Twp.
 Ashland Twp.

Putnam County:

Marion Twp.
 Jefferson Twp.
 Cloverdale Twp.
 Washington Twp.

Clay County—All

Owen County—

Greene County:

Wright Twp.
 Smith Twp.
 Jefferson Twp.
 Highland Twp.
 Richland Twp.
 Fairplay Twp.

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.22.

2-1-23-43 Thirty-Eighth District

Sec. 43. The Thirty-Eighth District consists of the following:

Vermillion County:

Helt Twp.
 Clinton Twp.
 Vermillion Twp.

Vigo County:

Fayette A through D
 Harrison 1A, 1C, 1D, 1E, 2E, 3C, 3F, 3I, 3J, 3K, 4G, 5A, 5F, 5G, 5H, 6A, 6C, 6D, 6E, 6F, 8A, 8B, 8C, 8E, and 8F

Lost Creek A through E

Harrison 8G

Nevins Twp.

Otter Creek A through F

Pierson A & B

Prairie Creek

Prairieton A

Riley A & B

Sugar Creek A through G

Parke County:

Liberty Twp.
 Sugar Creek Twp.
 Howard Twp.
 Reserve Twp.
 Penn Twp.
 Washington Twp.
 Green Twp.
 Union Twp.
 Adams Twp.
 Wabash Twp.
 Florida Twp.
 Raccoon Twp.
 Jackson Twp.

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.23.

2-1-23-44 Thirty-Ninth District

Sec. 44. The Thirty-Ninth District consists of the following:

Vigo County:

Harrison 1B, 1F, 1G, 1H, 2A, 2B, 2C, 2D, 2F, 2G, 2H, 2I, 2J, 3A, 3B, 3E, 3G, 3H, 4A, 4B, 4C, 4D, 4E, 4F, 5B, 5C, 5D, 5E, 6B, 7A,

7B, 7C, 7D, 7E, 7F, 7G, 7H, 7I, 7J, 7K, 7L, and 8D

Honey Creek A through F

Linton A & B

Knox County:

Busseron Twp.
 Widner Twp.
 Washington Twp.
 Steen Twp.
 Palmyra Twp.
 Harrison Twp.
 Johnson Twp.
 Vincennes Twp.
 Dacker Twp.

Gibson County:

White River Twp.
 Washington Twp.

Sullivan County—All

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1981, P.L.18, SEC.4; Acts 1982, P.L.5, SEC.24.

2-1-23-45 Fortieth District

Sec. 45. The Fortieth District consists of the following:

Brown County—All

Monroe County:

Bean Blossom Twp.
 Washington Twp.
 Richland Twp.
 Bloomington Twp.
 Benton Twp.
 Van Buren Twp.
 Perry Twp.
 Salt Creek Twp.

Greene County:

Beech Creek Twp.
 Center Twp.
 Jackson Twp.

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.25.

2-1-23-46 Forty-First District

Sec. 46. The Forty-First District consists of the following:

Bartholomew County—All
Johnson County:

Blue River 1 & 2 & 3
Franklin 1 through 7
Hensley 1
Needham Precinct 2
Nineveh 1
Union 1
White River 1 through 4 and 6

*As added by Acts 1981, P.L.4, SEC.1. Amended
by Acts 1982, P.L.5, SEC.26.*

2-1-22-47 Forty-Second District

Sec. 47. The Forty-Second District consists of the following:

Shelby County—All
Rush County—All
Decatur County—All
Franklin County:
Ray Twp.
Fayette County:
Orange Twp.
Fairview Twp.
Posey Twp.
Harrison Twp.
Waterloo Twp.
Jennings Twp.
Connorsville Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-22-48 Forty-Third District

Sec. 48. The Forty-Third District consists of the following:

Union County—All
Dearborn County—All
Ohio County—All
Ripley County—All
Fayette County:
Jackson Twp.
Columbia Twp.
Franklin County:
Posey Twp.
Laurel Twp.

Blooming Grove Twp.
Fairfield Twp.
Bath Twp.
Salt Creek Twp.
Metamora Twp.
Butler Twp.
Brookville Twp.
Springfield Twp.
Highland Twp.
Whitewater Twp.

Jefferson County:
Monroe Twp.
Shelby Twp.

Jennings County:
Columbia Twp.
Sand Creek Twp.
Center Twp.
Campbell Twp.
Montgomery Twp.
Vernon Twp.
Bigger Twp.
Lovett Twp.

Switzerland County:
Pleasant Twp.
Cotton Twp.
Posey Twp.

*As added by Acts 1981, P.L.4, SEC.1. Amended
by Acts 1982, P.L.5, SEC.27.*

2-1-22-49 Forty-Fourth District

Sec. 49. The Forty-Fourth District consists of the following:

Lawrence County—All
Jackson County—All
Orange County—All

Monroe County:
Indian Creek Twp.
Clear Creek Twp.
Polk Twp.

Martin County:
Halbert Twp.
Mitcheltree Twp.

Jennings County:

Geneva Twp.
Marion Twp.
Spencer Twp.

Jackson County—All

*As added by Acts 1981, P.L.4, SEC.1. Amended
by Acts 1982, P.L.5, SEC.28.*

2-1-22-50 Forty-Fifth District

Sec. 50. The Forty-Fifth District consists of the following:

Switzerland County:
York Twp.
Jefferson Twp.
Craig Twp.

Jefferson County:

Graham Twp.
Milton Twp.
Madison Twp.
Lancaster Twp.
Smyrna Twp.
Republican Twp.
Hanover Twp.
Saluda Twp.

Scott County—All

Clark County:

Bethlehem
Carr
Charlestown Precincts 1 through 7
Jeffersonville Precincts 20 & 21 & 22
Monroe 1 & 2 & 3
Oregon 1 & 2
Owen
Silver Creek Precincts 1 through 5
Utica 1 & 2
Union
Washington 1 & 2
Wood 1 & 2 & 3

Washington County:

Brown Twp.
Jefferson Twp.

Monroe Twp.
Gibson Twp.
Franklin Twp.
Washington Twp.
Vernon Twp.
Howard Twp.
Pierce Twp.
Polk Twp.
Jackson Twp.

*As added by Acts 1981, P.L.4, SEC.1. Amended
by Acts 1982, P.L.5, SEC.29.*

2-1-22-51 Forty-Sixth District

Sec. 51. The Forty-Sixth District consists of the following:

Floyd County—All

Clark County:

Jeffersonville Precincts 1 through 14, 23
through 28, and 30 through 39

*As added by Acts 1981, P.L.4, SEC.1. Amended
by Acts 1982, P.L.5, SEC.30.*

2-1-22-52 Forty-Seventh District

Sec. 52. The Forty-Seventh District consists of the following:

Spencer County—All
Perry County—All
Crawford County—All
Harrison County—All

Warrick County:

Lane Twp.
Owen Twp.
Pigeon Twp.
Boon Twp.
Skelton Twp.

Dubois County:

Columbia Twp.
Marion Twp.
Hall Twp.
Patoka Twp.

Jackson Twp.
 Jefferson Twp.
 Cass Twp.
 Ferdinand Twp.
 Washington County:
 Madison Twp.
 Posey Twp.
 Martin County:
 Lost River Twp.

As added by Acts 1981, P.L.4, SEC.1.

2-1-22-53 Forty-Eighth District

Sec. 53. The Forty-Eighth District consists of the following:

Greene County:
 Stockton Twp.
 Grant Twp.
 Taylor Twp.
 Cass Twp.
 Washington Twp.
 Stafford Twp.
 Daviess County—All
 Martin County:
 Perry Twp.
 Center Twp.
 Rutherford Twp.
 Dubois County:
 Harbison Twp.
 Boone Twp.
 Madison Twp.
 Bainbridge Twp.
 Pike County—All
 Gibson County:
 Patoka Twp.
 Center Twp.
 Columbia Twp.
 Union Twp.
 Barton Twp.
 Johnson Twp.
 Knox County:
 Vigo Twp.

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1981, P.L.18, SEC.5.

2-1-22-54 Forty-Ninth District

Sec. 54. The Forty-Ninth District consists of the following:

Prasey County—All
 Gibson County:
 Wabash Twp.
 Montgomery Twp.
 Vanderburgh County:
 Armstrong 1
 Center Precincts 8 and 9
 Evansville Ward 2 Precincts 13, 14, and 17
 Evansville Ward 3 Precincts 1 through 3, 8, 9, 12, 13, and 16
 Evansville Ward 4 Precincts 1 through 15
 Evansville Ward 5 Precincts 3 through 5, 8, 10, and 20
 Evansville Ward 6 Precincts 1 through 22
 German 1 through 6
 Knight Precinct K1
 Perry Precincts 1 through 7
 Pigeon Precincts A through C
 Union

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.31.

2-1-22-55 Fiftieth District

Sec. 55. The Fiftieth District consists of the following:

Warrick County:
 Greer Twp.
 Hart Twp.
 Campbell Twp.
 Ohio Twp.
 Anderson Twp.
 Vanderburgh County:
 Center Precincts 1 through 7
 Evansville Ward 1 Precincts 1 through 8, 9A, 9B, 10 through 17, 18A, 18B, and 19 through 23

Evansville Ward 2 Precincts 1, 2A, 2B, 3 through 12, 15, 16, 18, 19, and 20 through 22
 Evansville Ward 3 Precincts 4 through 7, 10, 11, 14, 15, and 17
 Evansville Ward 5 Precincts 1, 2, 6, 7, 9, 11 through 19, 21, and 22
 Knight Precinct K2 and K3
 Scott 1 through 3 and S-4

As added by Acts 1981, P.L.4, SEC.1. Amended by Acts 1982, P.L.5, SEC.32.

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APPENDIX F

**PLAINTIFFS' EXHIBIT 39
DEFENDANTS' EXHIBIT HH
EXCERPTS FROM DEFENDANTS' EXHIBIT 1**

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SENATE RANKING BASED ON 2 RACE AVERAGE (50.15% Democratic)

1. MOSBY (3)	92.4%
2. CARSON (34)	81.1%
3. MRYAN (1)	80.4% ✓
4. MAHERN (33)	74.5%
5. BUSHNET (4)	68.6% ✓
6. HUNT (10)	65.5%
7. BAIRD (46)	60.9% ✓
8. MONK (39)	60.5% ✓
9. O'DAY (49)	59.9% ✓
10. O'BANNON (47)	58.9% ✓
11. LEWIS (45)	57.9% ✓
12. CRAYCRAFT (26)	56.9% ✓
13. HUME (48)	56.3% ✓
14. Potesta (2)	54.7%
15. Nugent (43)	53.7% ✓
16. MCCARTY (25)	53.4% ✓
17. Dunbar (38)	53.3% ✓
18. NEARY (8)	52.2%
19. TOWNSEND (19)	50.3% ✓
20. Corcoran (44)	50.3%
-----20 seats were carried by better than 50.15% statewide average	
21. Hession (42)	49.3%
22. Niemeyer (6)	48.3% ✓
23. Server (50)	48.2%
24. Butcher (21)	48.0% ✓
25. Duckworth (40)	47.8%
26. Jessup (20)	47.7%
27. NICHOLSON (27)	47.4% ✓
28. Costas (5)	47.0%
29. Pease (37)	46.4%
30. Guy (7)	46.0%
31. Rogers (28)	45.3%
32. Miller (9)	44.7%
33. Zakas (11)	44.6% ✓
34. Justice (18)	44.4%
35. Snowden (17)	44.1% ✓
36. Garton (41)	43.9% ✓
37. GERY (22)	43.8% ✓
38. Harrison (23)	42.4% ✓
39. Sinks (16)	41.6%
40. Blankenbaker (30)	41.6%
41. MacDonald (15)	40.8% ✓
42. Vobach (31)	39.8% ✓
43. Norman (14)	39.2% ✓
44. Mills (35)	39.0%
45. Bosma (32)	38.8%
46. Augsburg (13)	38.6%
47. Borst (36)	38.6%
48. Shank (12)	37.0%
49. Parent (24)	32.8%
50. Duvall (29)	26.8% ✓

To carry half the seats requires 2.2% better than 50.15% or about 52.35% of the vote statewide assuming the additional vote is distributed equally statewide.

✓ = ELECTED IN 1982
(PER EXHIBIT 33)

PLAINTIFFS
EXHIBIT
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TABLE IV

RANKING BASED ON STATE AUDITOR'S RACE (51.1% Democratic)

Single-Member Districts	Double-Member Districts	Triple-Member Districts
1.	BROWN, ROGERS (14)	92.2%
2.	" "	" "
3.	KATIC, HARRIS (12)	84.2%
4.	" "	" "
5.	" "	CRAWFORD, SUMMERS, DAY (51) 83.9%
6.	" "	" "
7.	" "	" "
8. GOODALL (34)	67.7%	
9. HAYS (77)	67.6%	
10.	KROMOSKI, BAUER (7)	66.2%
11.	" "	" "
12.	HRIC, PETERSEN (11)	66.2%
13.	" "	" "
14. CAMPBELL (37)	64.9%	
15. ROACH (45)	63.9%	
16. HEEKE (73)	63.0%	
17. Mathen (71)	61.8%	
18. COCHRAN (72)	61.4%	
19. DOBIS (13)	61.2%	
20. HELLMAN (43)	61.2%	
21. ROBERTSON (70)	60.8%	
22. PHILLIPS (74)	60.2%	
23. BARON HILL (66)	60.0%	
24. LUTZ (76)	59.2%	
25. CLINGAN (42)	57.5%	
26. SNIDER (64)	57.4%	
27. BIRCHOFF (68)	56.3%	
28. HINE (63)	55.1%	
29. Kieley (36)	54.6%	
30. SCHUCK (30)	54.0%	
31. UNDERWOOD (55)	53.8%	
32. COOK (17)	53.6%	
33.	" "	BONSER, Budak (9) 53.6%
34.	" "	" "
35. PRICE (5)	53.2%	
36. MARSHALL (69)	53.2%	
37. TIMCHER (46)	51.1%	
38. GOBLE (67)	51.0%	
39. Espich (32)	50.4%	
40. SCHULTZ (61)	50.2%	
41.	" "	WILSON, Ayres (10) 50.2%
42.	" "	" "
43. Hibner (54)	50.1%	
44. Hoover (33)	50.1%	
45. Dean (62)	49.9%	
46. Coleman (54)	49.6%	
47.	" "	AVERY, Becker (75) 49.3%
48.	" "	" "
49.	" "	TURNER, Duckwall (31) 49.3%
50.	" "	" "
51. Thomas (44)	49.1%	
52. Moberly (57)	48.7%	
53. Taylor (8)	48.1%	
54. McIntyre (65)	47.7%	
55. KLINXER (27)	47.7%	
56.	" "	Fifield, Reppa (15) 47.6%
57.	" "	" "
58. Stephan (21)	47.1%	
59. JONTZ (25)	46.4%	
60. Bales (60)	46.3%	
61. Mangus (6)	45.9%	
62. Becker (24)	45.6%	
63.	" "	Engle, Pond, Worden (20) 45.2%
64.	" "	" "
65.	" "	" "
66. HAYES (59)	45.2%	
67. Regnier (29)	45.1%	
68. Musselman (23)	44.2%	
69. Dailey (35)	44.2%	
70. Fox (2)	43.7%	
71. Roorda (16)	42.5%	
72.	" "	Keeler, Mamm. Spencer (49) 42.1%
73.	" "	" "
74.	" "	" "
75. Mishler (22)	41.9%	
76.	" "	Buell, Harper, Miller (50) 41.0%
77.	" "	" "
78.	" "	" "

Exhibit HH

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79.		Alderman, Gabet, Harper(19)	41.0%
80.		" " "	
81.		" " "	
82.	JONES (26)		41.0%
83.			
84.		Dorbecker, Leuw, Schmid (52)	41.0%
85.		" " "	
86.	Davis (28)		40.7%
87.	Richardson (53)		40.5%
88.	Gerig (1)		40.0%
89.	Mullendore (58)		39.9%
90.	Pool (41)		39.7%
91.	Dellinger (38)		39.4%
92.	Bray (47)		37.7%
93.			
94.		Burkley, Nelson, Soards (48)	36.4%
95.		" " "	
96.	Warner (4)		35.6%
97.	Maury (18)		34.4%
98.	Mock (3)		34.8%
99.	Thompson (40)		33.8%
100.	Donaldson (39)		22.3%

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Analysis of SEN1971
Ideal population size=109803 maximum deviation=2.00%

Dist #	Pop.	Dev.	Dev%	Black%
1	68772	-41031	-37.37*	21.1
2	118863	9060	8.25*	5.1
3	103672	-6131	-5.58*	84.8
4	69407	-40396	-36.79*	24.5
5	131843	22040	20.07*	.3
6	132877	23074	21.01*	.2
7	126752	16949	15.44*	.1
8	106893	-2510	-2.65*	8.1
9	110736	933	.85	4.2
10	89186	-20617	-18.78*	18.0
11	115737	5934	5.40*	1.1
12	113737	3934	3.58*	4.9
13	108547	-1256	-1.14	.1
14	108633	-1170	-1.07	5.0
15	111913	2110	1.92	9.4
16	107395	-2408	-2.19*	9.7
17	127303	17500	15.94*	.3
18	108073	-1730	-1.58	1.4
19	107675	-2128	-1.94	.1
20	110109	306	.28	4.8
21	103815	-5988	-5.45*	4.2
22	116569	6766	6.16*	1.7
23	108635	-1168	-1.06	.4
24	124095	14292	13.02*	.3
25	100374	-9429	-8.59*	9.1
26	102145	-7658	-6.97*	7.3
27	101988	-7815	-7.12*	3.8
28	114656	4853	4.42*	.9
29	131829	22026	20.06*	12.5
30	95925	-13878	-12.64*	27.9
31	106102	-3701	-3.37*	18.5
32	114208	4405	4.01*	4.9
33	78513	-31290	-28.50*	39.7
34	73739	-36064	-32.84*	68.1
35	111238	1435	1.31	2.9
36	111298	1495	1.36	2.1
37	127444	17641	16.07*	.3
38	97669	-12134	-11.05*	5.1
39	117046	7243	6.60*	1.4
40	124059	14256	12.98*	2.0
41	120452	10649	9.70*	1.5
42	107452	-2351	-2.14*	.9
43	119919	10116	9.21*	.4
44	115763	5960	5.43*	.4
45	119451	9648	8.79*	3.9
46	122251	12448	11.34*	1.9
47	105475	-4328	-3.94*	.2
48	108580	-1223	-1.11	1.1
49	99232	-10571	-9.63*	7.7
50	131370	21567	19.64*	3.7

Extreme dev%=-37.37, 21.01 Deviation range=58.38

Exhibit 1

A-124

Analysis of HR1972

Ideal population size=54901 maximum deviation=2.00%

Dist #	Pop.	Dev.	Dev%	Black%
1	88379	-20923	-19.06*	6.9
2	97942	-11860	-10.80*	14.5
3	102463	-7339	-6.68*	23.5
4	135084	25282	23.03*	2.1
5	80210	-29592	-26.95*	91.2
6	122277	12475	11.36*	4.9
7	105850	-3952	-3.60*	8.1
8	87256	-22546	-20.53*	21.1
9	112444	2642	2.41*	4.9
10	53254	-1647	-3.00*	.8
11	116706	6904	6.29*	2.5
12	59899	4998	9.10*	.1
13	59790	4889	8.91*	.2
14	167509	2806	1.70	10.9
15	161791	-2912	-1.77	5.0
16	55385	484	.88	.1
17	63433	8532	15.54*	.3
18	58695	3794	6.91*	.5
19	66423	11522	20.99*	.2
20	57422	2521	4.59*	.1
21	54253	-648	-1.18	.6
22	54921	20	.04	2.3
23	46203	-8698	-15.84*	.3
24	53196	-1705	-3.11*	.0
25	114583	4781	4.35*	4.8
26	49093	-5808	-10.58*	7.9
27	58593	3692	6.72*	.7
28	57863	2962	5.40*	.1
29	51630	-3271	-5.96*	1.5
30	63042	8141	14.83*	2.0
31	52295	-2606	-4.75*	1.1
32	55017	116	.21	.4
33	73137	18236	33.22*	.1
34	63709	8808	16.04*	.5
35	54886	-15	-.03	2.1
36	44714	-10187	-18.56*	18.6
37	66121	11220	20.44*	2.3
38	35202	-19699	-35.88*	17.0
39	52582	-2319	-4.22*	.3
40	48265	-6636	-12.09*	7.9
41	52057	-2844	-5.18*	.9
42	170856	6153	3.74*	15.0
43	144739	-19964	-12.12*	31.6
44	164611	-92	-.06	7.6
45	108477	-56226	-34.14*	63.8
46	160973	-3730	-2.26*	1.3
47	65620	10719	19.52*	.5
48	55913	1012	1.84	1.0
49	48820	-6081	-11.08*	5.6
50	54493	-408	-.74	5.3
51	67237	12336	22.47*	3.2
52	67591	12690	23.11*	.0
53	59958	5057	9.21*	1.4

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54	59640	4739	8.63*	.6
55	59815	4914	8.95*	.3
56	53989	-912	-1.66	.9
57	60028	5127	9.34*	.5
58	58634	3733	6.80*	.1
59	58394	3493	6.36*	1.6
60	56535	1634	2.98*	.7
61	58317	3416	6.22*	.4
62	53107	-1794	-3.27*	.9
63	54726	-175	-.32	.3
64	56962	2061	3.75*	.2
65	58379	3478	6.34*	.6
66	62934	8033	14.63*	.9
67	58535	3634	6.62*	7.1
68	55227	326	.59	3.9
69	65798	10897	19.85*	.3
70	57332	2431	4.43*	.0
71	102405	-7397	-6.74*	6.7
72	120058	10256	9.34*	4.5
73	56002	1101	2.01*	1.7

Extreme dev%=-35.88, 33.22 Deviation range=69.10

A-126

Analysis of SEN1982

Ideal population size=109803 maximum deviation=2.00%

Dist #	Pop.	Dev.	Dev%	BLACK%
1	108125	-1678	-1.53	17.5
2	109108	-695	-.63	.8
3	108983	-820	-.75	71.9
4	108175	-1628	-1.48	25.6
5	106831	-972	-.89	.3
6	108557	-1246	-1.13	.2
7	107975	-1828	-1.66	.2
8	107669	-2134	-1.94	8.0
9	107644	-2159	-1.97	.8
10	108450	-1353	-1.23	18.1
11	108736	-1067	-.97	1.3
12	108967	-836	-.76	5.1
13	109672	-131	-.12	.2
14	112349	2546	2.32*	3.1
15	111891	2088	1.90	12.7
16	110226	423	.39	7.9
17	108591	-1212	-1.10	.2
18	108368	-1435	-1.31	1.4
19	108642	-1161	-1.06	.1
20	109524	-279	-.25	4.8
21	111262	1459	1.33	3.9
22	107847	-1956	-1.78	1.9
23	112778	2975	2.71*	.2
24	108269	-1534	-1.40	.3
25	111187	1384	1.26	8.4
26	108876	-927	-.84	6.8
27	108648	-1155	-1.05	3.6
28	108222	-1581	-1.44	1.0
29	108435	-1368	-1.25	4.6
30	108408	-1395	-1.27	24.1
31	108129	-1674	-1.52	15.5
32	111438	1635	1.49	2.8
33	109284	-519	-.47	34.2
34	108038	-1765	-1.61	58.4
35	111988	2185	1.99	2.2
36	110324	521	.47	1.7
37	111287	1484	1.35	.1
38	110582	779	.71	1.4
39	109914	111	.10	5.1
40	110841	1038	.95	2.3
41	110217	414	.38	1.6
42	111943	2140	1.95	.8
43	110268	465	.42	.5
44	111779	1976	1.80	.4
45	111942	2139	1.95	.9
46	111507	1704	1.55	5.3
47	111713	1910	1.74	.4
48	110828	1025	.93	.7
49	111875	2072	1.89	9.3
50	111867	2064	1.88	1.8

Extreme dev%=-1.97, 2.71 Deviation range=4.68

A-127

Analysis of HR1982

Ideal population size=54901 maximum deviation=2.00%

Dist #	Pop.	Dev.	Dev%	BLACK%
1	55848	947	1.72	.2
2	55249	348	.63	.0
3	55146	245	.45	1.3
4	54454	-447	-.81	.4
5	54885	-16	-.03	9.0
6	54763	-138	-.25	.6
7	111544	1742	1.59	18.0
8	54595	-306	-.56	2.0
9	109643	-159	-.14	7.7
10	110825	1023	.93	.3
11	111692	1890	1.72	4.9
12	111977	2175	1.98	30.6
13	55807	906	1.65	13.3
14	112332	2530	2.30*	69.9
15	111687	1885	1.72	.3
16	55890	989	1.80	.1
17	55355	454	.83	.9
18	54041	-860	-1.57	.4
19	165327	624	.38	11.5
20	165309	606	.37	4.4
21	54972	71	.13	.1
22	55735	834	1.52	.3
23	55341	440	.80	2.0
24	55856	955	1.74	.6
25	55649	748	1.36	.1
26	55492	591	1.08	2.0
27	54115	-786	-1.43	1.6
28	55222	321	.58	.2
29	55559	658	1.20	.7
30	54690	-211	-.38	7.2
31	108241	-1561	-1.42	5.0
32	55876	975	1.78	.0
33	54541	-360	-.66	.2
34	55167	266	.48	12.1
35	53863	-1038	-1.89	1.7
36	54891	-10	-.02	2.4
37	54631	-270	-.49	15.0
38	55485	584	1.06	.5
39	54033	-868	-1.58	.2
40	54042	-859	-1.56	.0
41	53962	-939	-1.71	.4
42	54755	-146	-.27	.5
43	54788	-113	-.21	7.8
44	54364	-537	-.98	1.0
45	54083	-818	-1.49	2.2
46	54664	-237	-.43	1.0
47	53868	-1033	-1.88	.0
48	162630	-2073	-1.26	3.7
49	161947	-2756	-1.67	21.6
50	161956	-2747	-1.67	5.5
51	162437	-2266	-1.38	61.2
52	163928	-775	-.47	3.7
53	54279	-622	-1.13	.4

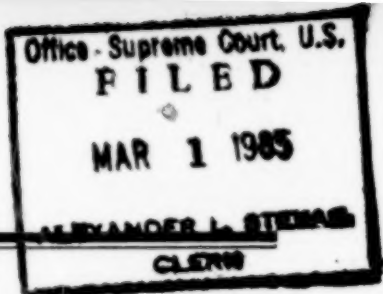
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54	54475	-426	-.78	.9
55	53925	-976	-1.78	.9
56	54551	-350	-.64	7.0
57	54541	-360	-.66	.6
58	54690	-211	-.38	1.5
59	54410	-491	-.89	1.7
60	53842	-1058	-1.93	.7
61	54754	-147	-.27	3.9
62	54255	-646	-1.18	.4
63	55897	996	1.81	.3
64	54715	-186	-.34	1.9
65	54058	-843	-1.54	.2
66	55966	1065	1.94	.5
67	55039	138	.25	.1
68	55445	544	.99	.5
69	55571	670	1.22	1.0
70	55182	281	.51	.7
71	54307	-594	-1.08	7.4
72	56284	1383	2.52*	3.8
73	55787	886	1.61	.0
74	54756	-145	-.26	.4
75	109781	-21	-.02	1.8
76	55044	143	.26	1.9
77	55473	572	1.04	17.0

Extreme dev%=-1.93, 2.52 Deviation range=4.45

No. 84-1244

2



IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,
Appellants,

v.

IRWIN C. BANDEMER, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the 1981 Indiana state legislative apportionment laws invidiously discriminate against an identifiable group of citizens in violation of the equal protection clause of the Fourteenth Amendment because the laws were designed to and do preclude the voters of one political party from electing a majority of the state legislature, through the use of bizarrely shaped districts which (1) ignore all existing political boundaries and communities of interest, (2) utilize an inconsistent mix of single, double and triple-member districts, and (3) are arbitrary and without justification.

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On Appeal from the United States District Court
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MOTION TO AFFIRM

Appellees Bandemer, *et al.*, respectfully move that the Court summarily affirm the district court's decision declaring unconstitutional the Indiana reapportionment statutes.

STATEMENT

Introduction

Appellants seek to reverse the decision of the United States District Court for the Southern District of Indiana declaring the 1981 Indiana state legislative apportionment laws to be in violation of the equal protection clause of the fourteenth amendment and enjoining the State from conducting elections pursuant to those laws.

Background

A. Indiana's Legislature And Politics.

The state legislature or "General Assembly" in Indiana consists of a 100-member House of Representatives and a 50-member Senate. Representatives are elected to two-year terms. Senators are elected to four-year terms. Senators' terms are staggered so that only one-half of the 50 senators are subject to reelection during any general election.

Article 4, Section 5 of the Constitution of the State of Indiana requires that at the first session of the General Assembly after each census the number of senators and representatives shall be fixed by law and apportioned among the several counties. Historically, Indiana's apportionment laws had allocated House and Senate seats among its 92 counties (or groups of counties) that elected their share of the General Assembly. If a county was entitled to more than one seat, all seats were elected at large from the county. The result of this system by 1972 was that Marion County (Indianapolis) elected 15 representatives and eight senators at large. The party that carried Marion County became the majority party. In reaction to *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), that pattern was changed in 1972. The first General Assembly after the 1980 census convened on November 18, 1980. As a result of the 1980 Republican landslide, the Republicans enjoyed a 63 to 37 advantage in the House and a 35 to 15 advantage in the Senate.

In Indiana the legislative process in each house is controlled by the political party holding a majority of seats in that house. The majority party in the House elects the Speaker, who in turn exercises absolute control over the committee to which bills are assigned and whether a bill will ever reach the floor for a vote. In Indiana, a Speaker wishing to prevent a piece of legislation from becoming

law may simply refuse to "hand it down" as a matter of unfettered discretion. Similarly, the majority party elects the floor leaders in both houses who control the flow of legislation, the assignment of members to committees and the appointment of committee chairmen.

Indiana is a "swing state" neither overwhelmingly Democratic or Republican. In "normal" years (1976 and 1982), the Republican candidates for Supreme Court Clerk and Reporter¹ received 51% and 50.8% of the statewide vote for the two major parties. (Exhibit 30.)² In the best Democratic years (1974 and 1958), the Republican totals decline to 44.3% and 44.6%, and in the best Republican years (1980 and 1972), the Republican totals were 56.1% and 57.4%. (Exhibit 30.) Although there is a small third-party vote for statewide offices, there is no significant third-party vote for legislative seats. Because the Senate is elected for staggered terms (one-half stands every two years), two elections are necessary to gain control of both houses. A party that can insulate itself from swings of up to 10% from the norm can effectively perpetuate its control of the state legislature (i.e., can keep a majority despite a 55% vote for the opposition).

B. The 1981 Reapportionment.

The reapportionment process began during the 1981 legislative session on February 13 when House Bill 1475 was introduced by members of the Republican leadership.

¹ Experts for both sides agreed that the vote for these "anonymous" state offices (i.e., those where the officials have very low name recognition) is the best indication of party vote. See generally, Backstrom, Robins & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1131-39 (1978).

² For the convenience of the Court, the statistical exhibits (exhibits 30, 31, 32, 35 and 39) cited in this Motion are included in the Appendix to this Motion. Other exhibits cited in this Motion have not been included in the Appendix to this Motion because of their size.

That bill was a "vehicle bill". That is to say, the bill had no content; all it did was amend the definitional paragraph of the existing statute apportioning the State for House Districts to include the phrase "standard metropolitan statistical area" and change the date of the census from 1970 to 1980. (Exhibit 56.) A similar "vehicle bill", Senate Bill 80, was introduced by the Republican leadership in the Senate. (Exhibit 57.)

These bills were passed in their respective chambers and then sent to the other chamber where they were amended by making wholly insignificant changes, solely so the two bills, no longer identical, would be referred to a conference committee. By virtue of the procedural rules adopted by the Republican majority in the General Assembly, a bill once assigned to conference committee could be returned to the legislature for a vote only if approved by a unanimous vote of the conferees. All the members of the conference committee to which these vehicle bills were referred were Republicans.

After the vehicle bills had been assigned to the conference committee, the process of giving the bills substance began. This work was done by a few members of the Republican leadership and their staff in an office rented for them by the Republican State Committee. The major tool used in this process was a computer system provided by a Detroit, Michigan computer firm, Market Opinion Research ("MOR"). MOR's services were obtained, again not by the state legislature, but by the Republican State Committee. The Republican State Committee paid MOR \$250,000 for those services.

The members of the legislative minority and the public were totally excluded from the map drawing process. They did not have access to the computer equipment, programs or data³; nor were they given the opportunity to view

³ The raw data is theoretically a matter of public record, but only theoretically. The election returns by precinct are buried in various

any preliminary maps. Similarly, at no time during the two and one-half month period the majority was reapportioning the State did the Republican majority afford the citizens of the State of Indiana an opportunity to comment on any proposed maps.

The legislative session was, by law, required to end on April 30, 1981. On April 28, the conference committee unveiled for the first time the majority's plan for new legislative districts. This disclosure of the contents of the heretofore empty bills was the first time anyone other than Republican legislators or party officials had an opportunity to view these enormously complex plans. On the final day of the 1981 regular session, the Senate and House adopted the conference report, voting along party lines. During the 1982 legislative session, technical revisions were made in the bills in order to correct a number of mechanical errors such as inconsistencies in the districts as drawn during the 1981 session.

C. The 1982 Election Results.

In November 1982, a general election was held under the 1981 reapportionment plan. That election reflected a "normal" year. Of the three statewide races for the anonymous offices (auditor, treasurer and court clerk), two Republicans and one Democrat won. Each of the six candidates received between 48.9% and 51.1% of the statewide vote. (Exhibit 31.) The statewide Democratic vote for the average of the auditor and court clerk races was 50.15%. (Exhibit 35.)

Democratic candidates for the Indiana House received 51.9% of all votes cast statewide for House races. (Ex-

forms in the offices of 92 county clerks. Simply collecting the data and then tabulating it to determine the political make up of a proposed district is not practical without access to Marketing Opinion Research's data base in any period of time less than several months.

hibit 31.) Nevertheless, only 43 Democrats were elected to the House of Representatives. The Democratic vote in the 51st most Democratic House district was only 44.4% (Exhibit 32), 5.6% shy of the amount needed to unseat the majority, and outside the 10% swing vote (5.6% is 13% of 44%) that either party has obtained in even a landslide year.

In the Senate, 13 Democrats and 12 Republicans were elected. This reflected the fact that 13 of the 18 senate districts favorable to Democrats were up for election in 1982. If the 1984 election produced the same 50.15% Democratic vote, only 7 more Democrats would be expected to win for a total of 20 Democratic senators. (Exhibit 39.) Thus, under the 1981 reapportionment laws consecutive elections with a 50.15% Democratic vote would result in a Senate which was only 40% Democratic.

The Proceedings Below

In January 1982, this lawsuit was filed by Irwin C. Bandemer, Obi Badili, Ra-Nelle Pearson, George Womack Jr., Edward O'Rea, John Higbee, and David Scott Richards (the "Bandemer plaintiffs"), all Democrats and registered voters of the State of Indiana. Plaintiffs alleged that all districts in the House and Senate were drawn for the specific purpose of, and had the effect of, minimizing or cancelling out the voting strength of the political minority to which they belonged in violation of the equal protection clause of the fourteenth amendment to the United States Constitution, 28 U.S.C. § 1983, article 2, section 1, of the Constitution of the State of Indiana, and article 1, section 23, of the Constitution of the State of Indiana. Plaintiffs also alleged that the Senate reapportionment law unnecessarily divided the State's counties in violation of article 4, section 6, of the Constitution of the State of Indiana, and that both reapportionment laws created population variances between voting districts in excess of those required in violation of article 2, section

1 and article 1, section 23 of the Constitution of the State of Indiana. Plaintiffs requested a judgment declaring the reapportionment laws unconstitutional and enjoining defendants from administering and enforcing the reapportionment laws.

On February 2, 1982, a second lawsuit was filed challenging the State's reapportionment laws. The second suit was filed by the N.A.A.C.P. State Conference of Branches, the individual branches from the cities of Indianapolis, Fort Wayne, Gary and East Chicago, and eight individual citizens (the "NAACP plaintiffs"). The court consolidated the two cases for all purposes.

After trial, the district court found that the Bandemer plaintiffs had proved both discriminatory intent in the enactment of the reapportionment laws and discriminatory impact on an identifiable group of voters. The court ruled that the Bandemer plaintiffs had been intentionally discriminated against in violation of the fourteenth amendment to the United States Constitution. The court's Order declared the Indiana reapportionment laws unconstitutional and enjoined state officers responsible for implementing the election laws from holding elections pursuant to those reapportionment laws. The court gave the 1985 session of the General Assembly the opportunity to enact legislation to redistrict the State and reapportion the legislative seats in the General Assembly. To date, the General Assembly has not acted.

ARGUMENT

The only novel aspect of this case is factual. It is the egregiousness of the blatant gerrymandering of the electoral districts for the Indiana legislature in the apportionment plan found unconstitutional by the court below. The law applied by the lower court is far from novel. Rather, the lower court's ruling is based upon well-established principles repeatedly stated by this Court.

A. A Political Group May Be The Target Of Unconstitutional Mapmaking.

This Court has long stated that an apportionment plan that invidiously discriminates against a *political* group violates the equal protection clause. In *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (emphasis added), the Court noted that "It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or *political* elements of the voting population." The same language (explicitly recognizing that a political group may be the target of unconstitutional gerrymandering if the facts are proven) has been repeated by the Court in *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971); *White v. Regester*, 412 U.S. 755, 765 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *Chapman v. Meier*, 420 U.S. 1, 17 (1975); and *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980).

Here, plaintiffs proved that they were the target of reapportionment laws that were intended to have and had the effect of cancelling out their voting strength as a distinct and readily identifiable⁴ political element of the elec-

⁴In addition to the general election results, the location of a party's affiliates in Indiana is easily determined because primary voting requires a declaration of intent to vote for a majority of that party's candidates in the general election.

torate. The record relied on by the district court proves this invidious discrimination, not merely by relying on a presumption, but by showing both purpose and effect by a preponderance of the evidence, indeed beyond a reasonable doubt. For that reason, this case presents no substantial question of law.

B. The 1981 Indiana Reapportionment Laws Clearly And Severely Disadvantage Democrats.

This is purely and simply a case of unadorned and unconstitutional gerrymandering in the most extreme form. The Republican leadership in the State of Indiana announced its intention to exercise the power of its control of the state government to have "as many Republican districts as possible" (Dailey Dep. 20, 63) and "to hurt the Democrats as much as possible" (Bosma Dep. 110). In order to attain their stated purpose the majority resorted to a process that completely excluded members of the minority party (and all other citizens of the State) and developed a reapportionment plan that relied on bizarre shapes, ignored all traditional political boundaries, and mixed 61 single, 9 double and 7 triple-member districts in an effort to "stack" and "crack" Democratic voters so as to minimize the effectiveness of their vote and cancel their opportunity to elect a majority of the legislature.

That the majority party succeeded was clear from the results of the first election under the plan. Despite receiving 51.9% of the statewide vote, the Democrats captured only 43 of the 100 seats in the House. (Exhibit 31.) And, although the results in the Senate, if viewed superficially, may appear "fair", they actually reflect the same extreme bias against the minority. It is true, as the dissent below points out, that 13 of 25 Senate seats up for election in 1982 were won by Democrats and that such a result would appear to be in keeping with the 50.15% baseline Democratic vote. But this superficial analysis

suffers from a fatal fundamental flaw—it considers only half of the story. Thirteen of the 25 seats up for election in 1982 were Democratic in composition. (Exhibit 39.) In contrast, only seven of the 25 seats up for election in 1984 were Democratic in composition. (*Id.*) Even if Democrats received a slight majority of the statewide vote again in 1984, they would have gained only another seven Senate seats for a total of 20 of the 50 seats. (Exhibit 39.) Thus the contention by the dissent and by appellants that the 1982 Senate results show the fairness of the plan rests on a fundamental logical error.⁵ The effect of the plan is severe, indeed prohibitive of an effective vote by the minority.

The districting in two of Indiana's most populous metropolitan areas—Indianapolis (Marion County) and Fort Wayne (Allen County)—presents particularly striking examples of the majority's use of "stacking" (*i.e.*, compressing the minority vote into one district) and "cracking" (*i.e.*, splitting a concentration of minority voters among several districts) to disadvantage the minority. Marion County (which is the City of Indianapolis) is slightly Republican in political composition.⁶ The county's 1980

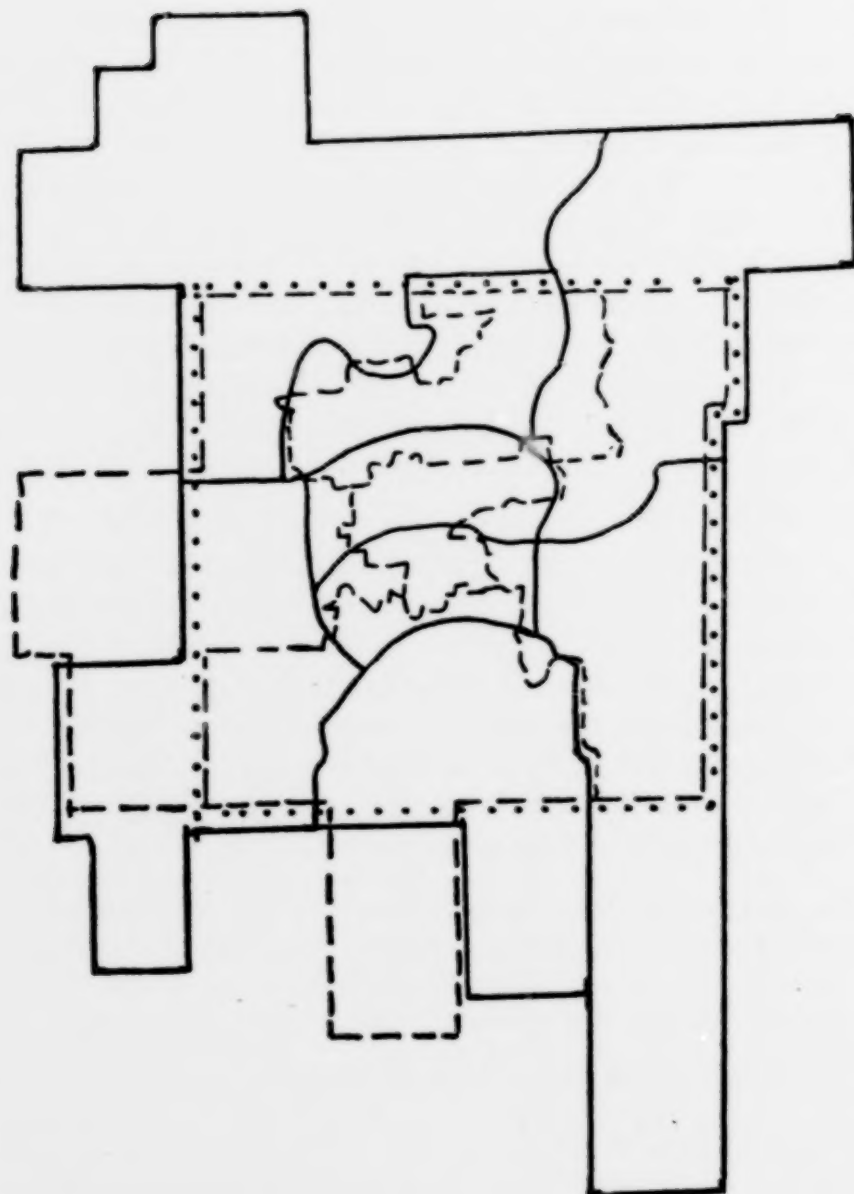
⁵ The dissent's analysis of the election data suffers from other factual and logical errors. The dissent relies on an average of the results for the 1982 auditor's race (50.8% vote for the Democratic candidate), 1982 court clerk race (48.7% Democratic vote) and the 1980 court reporter's race (43.9% Democratic vote) to conclude that "the measure of the Democratic voting strength statewide in Indiana" was 46.8%. (A-45.) The average of the three races relied on by the dissent is 47.8%, not 46.8%. This methodology is also flawed. It averages a "normal" year (1980) with a Republican year (1982) and omits any Democratic year. Moreover, the percentages used by the dissent reflect the Democratic percentage of the total vote including third-party candidates for statewide office. The only useful statistic—Democratic vote as a percentage of the two party vote—results in a measure of Democratic voting strength of 48.06% for those two years. (Exhibit 31.)

⁶ The dissent erroneously states the Democratic vote in Marion County to be 39% in 1982. The correct figure is 48.5%. (Exhibit X.)

population of 765,233 (Exhibit 23) entitles it to precisely 14 Representatives and 7 Senators. Undaunted by this statistic, the majority created 5 three-member House Districts for Marion County by patching on areas from two contiguous counties. This creative cartography enabled the majority to continue to stack Democratic voters in one three-member district in the hole of the donut while diluting significant concentrations of Democratic voters into the four three-member districts in the surrounding area. The result is 12 safe seats for the majority. Schematically, this can be seen on page 12. Marion County is essentially a square. The detailed lines of the districts are too irregular to be depicted in a documents of the size of this brief.

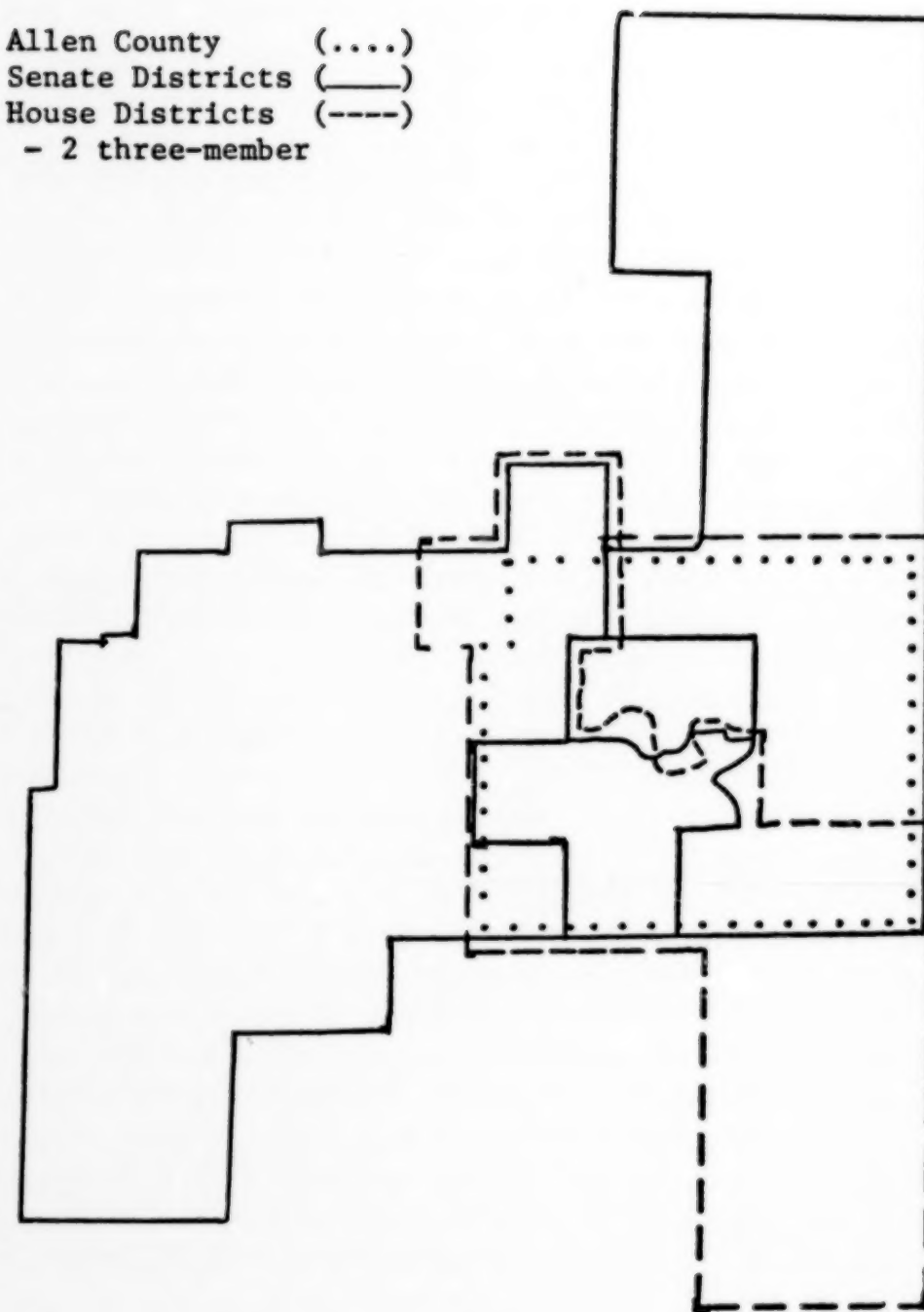
In Allen County, also essentially a square, the same goal gave rise to a different scheme. Rather than "stacking" the minority vote, the majority "cracked" it in half by splitting the otherwise Democratic City of Fort Wayne in two and combining each half with parts of the rest of Allen County and parts of three surrounding rural counties to create two solidly Republican three-member districts. This is shown on page 13.

The result of these techniques was the election of 18 (86%) Republican representatives and 3 (14%) Democratic representatives from these two areas that compose 21% of the State. This despite the fact that the vote in these areas was 46.3% Democratic. (Exhibit X.)



Marion County (.....)
 Senate Districts (——)
 House Districts (----)
 - 5 three-member

Allen County (.....)
 Senate Districts (——)
 House Districts (----)
 - 2 three-member



C. The Plan Constitutes A Purposeful Effort To Wall Democrats Out Of The Legislative Process.

Two fundamental equal protection doctrines support the ruling below. Either is independently sufficient to affirm the judgment. First, a state may not intentionally disadvantage any class of citizens in the exercise of their fundamental right to vote. *Rogers v. Lodge*, 458 U.S. 613 (1982). That is precisely what appellees proved and the district court found occurred in Indiana. Thus, whether or not a finding of intent is a necessary element of such an equal protection claim, it is sufficient to establish such a claim when the intent and effect are shown. It is beyond doubt that an intentionally discriminatory apportionment plan is constitutionally impermissible. It is likewise beyond doubt that a finding of such an intent is fully supported, indeed mandated, by the evidence in this case as detailed in the district court's opinion. The dissent does not challenge that finding.

D. The Plan Bears Every Objective Indication Of Arbitrary Governmental Action.

Regardless of intent, any legislative classification of citizens must be rational and based on legitimate state interests. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Reed v. Reed*, 401 U.S. 71, 76 (1971). On its face, the 1981 Indiana apportionment law treats different classes of citizens differently by placing them in different types of districts. No justification for any of these differences was offered in the district court. And there is none. The evidence reveals only a wholly irrational plan unsupported by any interests other than advantage to the majority, which is by definition impermissible, just as much as a tax on members of only one party.

1. *The Legislative Process Was Exclusionary.* The legislative process used to adopt the Indiana reapportionment laws featured a secret plan, vehicle bills, specious amendments, an all majority conference committee, so-

phisticated technology paid for by the majority party, and an eleventh hour vote. By employing these tactics, the majority managed effectively to exclude any opportunity for comment or review by the minority or the public. In so doing, the real purpose of the legislative process was revealed—the adoption of a reapportionment law of the majority, by the majority and for the majority. The findings of the district court are fully supported by the record.

2. *Existing Boundaries Are Wholly Disregarded.* Article 4, Section 6, of the Indiana Constitution requires that, “no county, for senatorial apportionment, shall ever be divided.” In 1896, the Indiana Supreme Court held that when this requirement must yield to population equality, it should be bent only to the extent necessary. *Denney v. State*, 144 Ind. 503, 42 N.E. 929 (1896). In devising the Senate plan, the majority chose simply to ignore the standard constitutional doctrine. The 1981 plan divides the counties in Indiana 73 times—far more than was necessary to meet the requirements of equal population, and far more than the previous districting law, which divided counties only 53 times, or an alternative map, which divided counties only 38 times. There is not a single district in the 1981 law that is comprised solely of any county or group of counties. In this respect, the 1981 plan is completely different from the Indiana plan involved in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), where counties in Indiana were assigned at large delegations in proportion to their population.⁷

The majority's blatant disregard for existing political boundaries is apparent in view of the fate of political subdivisions under the plan which are themselves a multiple (within the 2% population deviation utilized by the

⁷ For the majority to give Marion County 14 at large representatives and seven senators (which its population perfectly fits) would run the risk that the whole delegation and therefore the legislature itself could be captured.

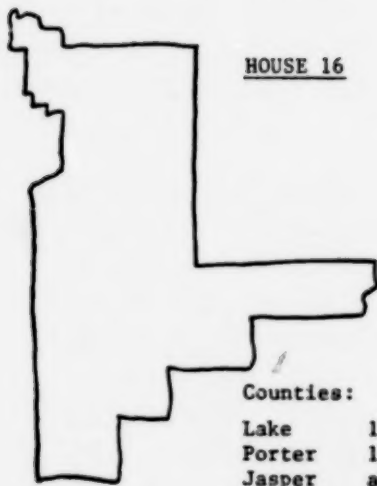
majority) of the ideal district size. Rather than use these natural building blocks, the majority split every one of them. The following are examples.

Political District	Population/ Deviation	Potential Districts	Representation Under Current Law
LaPorte Co. (County and City of LaPorte)	108,632 (1.0%)	2 house 1 senate	Parts of 1 double-member and parts of 1 single-member house district. Parts of 2 senate districts.
Marion Co. (Coterminous with City of Indianapolis)	765,233 (0.4%)	14 house 7 senate	All of 3 and parts of 2 triple-member house districts. All of 3 senate districts and parts of 5 others.
Vanderburgh Co. (Contains City of Evansville)	167,515 (1.7%)	3 house	All of 1 and parts of another single-member house district and parts of 1 double-member house district.
St. Joseph Twp. (Allen Co.)	55,381 (0.8%)	1 house	Part of 1 triple-member house district.
Jeffersonville Twp. (Clark Co.)	55,831 (1.6%)	1 house	Divided between 2 single-member house districts.
Portage Twp. (St. Joseph Co.)	109,694 (.09%)	2 house 1 senate	Part of 1 single-member and 1 double-member house district. Part of 3 senate districts.
City of South Bend	109,727 (.06%)	2 house 1 senate	Part of 2 single-member and 1 double-member house districts. Part of 3 senate districts.

3. *Bizarre Shapes Abound.* As is typical of gerrymandering for whatever purpose, the plans employed by the majority include many grotesque districts. As noted by the district court:

District 66 . . . begins in the southwest townships of Bartholomew County, includes ten of the twelve townships in Jackson County, includes one township in Jennings County, goes through a narrow passage by taking in Johnson and Lexington townships in Scott County, then expands into Clark County until reaching the state border at the Ohio River. District 42 fills a narrow portion of the state beginning with northern Vigo County at the southern most point and extends approximately 50 to 55 miles north to include one township (Hickory Grove) of Benton County. Along the way, the district picks up one northwest township of Parke County, splits Fountain County, and includes all of narrow Vermillion County.

Those two districts are not alone. Examples of some others appear on the next two pages.

HOUSE 16

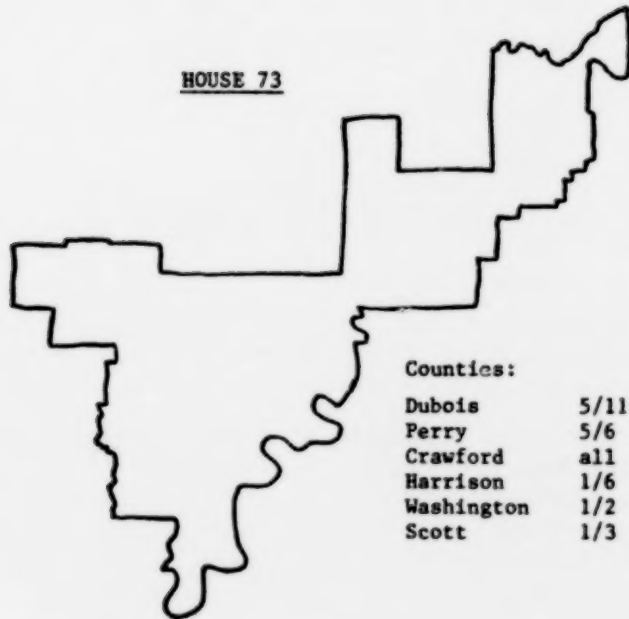
Counties:

Lake 1/6
Porter 1/2
Jasper all
Pulaski 1/3

SENATE 14

Counties:

Allen 1/2
DeKalb 2/3
Steuben all

HOUSE 73

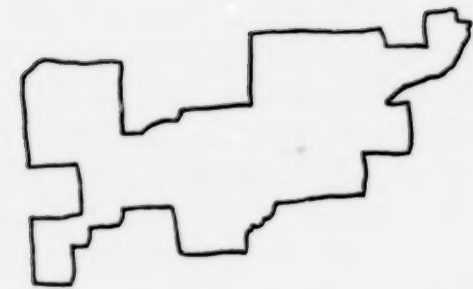
Counties:

Dubois 5/11
Perry 5/6
Crawford all
Harrison 1/6
Washington 1/2
Scott 1/3

HOUSE 46

Counties:

Vigo 1/3
Clay 1/3
Owen all
Morgan 1/6
Monroe 1/10
Greene 1/6
Sullivan 1/4

SENATE 38

Counties:

Vermillion 1/2
Parke all
Vigo 1/2
Putnam 2/3

SENATE 29

Counties:

Boone 1/6
Hamilton 1/6
Marion 1/8

SENATE 24

Counties:

Hamilton 1/3
Boone 3/4
Hendricks 3/5
Montgomery 1/5
Putnam 1/4



4. *There Is A Total Lack of Consistency.* The Indiana reapportionment laws reflect no consistent policy and none was even urged upon the district court. Juxtaposition of the House and Senate maps reveals not a single case of nesting, that is, two House districts contained within a single Senate district. Instead, the combination of the boundaries of the House and Senate districts creates a dizzying array of competing lines. The use of multimember districts is wholly inconsistent. They appear in urban and rural areas. The seven triple-member districts appear in the State's first and third largest urban areas, but not its second (Gary), fourth (South Bend), or fifth (Evansville), even though all but Indianapolis are similar in size. In some instances the multimember districts are used to concentrate common interests and in others to split them in half.

5. *There Is No Justification For The Laws.* The plan bears all indicia of irrationality. If the laws make any sense at all, they make sense only from the perspective of disadvantaging a minority political party—the perspective from which the maps were in fact drawn. Exhibits 51 and 52 show alternative ways to divide Indiana into only three districts, each electing at large delegations. Exhibit 52 creates a Democratic fortress by giving a majority of seats to the Northwest and Southern parts of the State. Exhibit 51 gives the Republican center a majority. Under each of these maps, one party or the other would control the legislature under any foreseeable election result. These hypothetical, ridiculous and obvious abuses of majority power are not distinguishable in principle from the 1981 Indiana reapportionment laws.

E. Defendants May Not Hide Behind The Principle Of "One Man, One Vote".

Appellants' claim that reliance on the principle of "one man, one vote" insulates otherwise discriminatory reapportionment laws from challenge ignores the repeated admonitions to the contrary by this Court. As the evi-

dence below overwhelmingly demonstrates, the creators of the Indiana apportionment plan believed that as long as the districts, although of different sizes, contained populations in proportion to their representatives, they were free to design a plan which would effectively insulate them from ever losing control of the legislature. "A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'" *City of Mobile v. Bolden*, 466 U.S. 55, 69 n. 14 (1980), quoting *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973). Use of sophisticated computer technology to ensure achieving that impermissible goal while satisfying numerical standards at the same time does not make that effort constitutional. To hold otherwise would fly in the face of the principles of representative government and equal protection of the laws that this Court's long line of apportionment cases has sought to protect. It simply reduces adherence to population guidelines to a game in which the mapmaker aided by technology can accomplish everything that was available to pre *Baker v. Carr* cartographers.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

[PLAINTIFF'S EXHIBIT 30]

PERCENT OF THE VOTE FOR DEMOCRATIC CANDIDATES
FOR REPORTER AND CLERK OF THE SUPREME
& APPELLATE COURTS

Year	Percent Democratic	Average of Two Races	(This two race average affects the control of the Senate with half of the members elected every 2 years.)
1954	48.8%	46.5%	
1956	44.2%	49.8%	
1958	55.4%	52.2%	
1960	49.0%	49.35%	
1962	49.7%	52.2%	
1964	54.7%	50.4%	
1966	46.1%	46.25%	
1968	46.4%	48.45%	
1970	50.5%	46.55%	
1972	42.6%	49.15%	
1974	55.7%	52.35%	
1976	49.0%	47.7%	
1978	46.4%	45.15%	
1980	43.9%	46.55%	
1982	49.2%		
<u>15 Election Average=48.8%</u>			

[PLAINTIFF'S EXHIBIT 31]

STATEWIDE ELECTION SUMMARY—1982

U.S. SENATOR	<u>Lugar</u>	<u>Fithian</u>	<u>%</u>
	978,301	828,400	45.85%
U.S. CONGRESS TOTAL	<u>ALL</u>	<u>ALL</u>	
	909,731	882,378	49.2%
SECRETARY OF STATE	<u>Simcox</u>	<u>Beardsley</u>	
	890,008	842,226	48.6%
AUDITOR OF STATE	<u>Loos</u>	<u>Cox</u>	
	845,464	883,240	51.1%
TREASURER OF STATE	<u>Ridlen</u>	<u>Bell</u>	
	864,247	852,725	49.7%
CLERK OF THE COURTS	<u>O'Laughlin</u>	<u>Evans</u>	
	871,632	844,450	49.2%
STATE REPRESENTATIVES	<u>ALL REP.</u>	<u>ALL DEMO.</u>	
	808,681	872,430	51.9%
STATE SENATORS	<u>ALL REP.</u>	<u>ALL DEMO.</u>	
	402,492	454,849	53.1%

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STATE REPRESENTATIVES	<u>REPUBLICAN</u>	<u>DEMOCRAT</u>	<u>REPUBLICANS</u>	<u>DEMOCRATS</u>
	<u>cand.</u>	<u>cand.</u>	<u>ELECTED</u>	<u>ELECTED</u>
83 opposed	735,952 (83)	724,671 (83)	51	32
17 unopposed	72,729 (6)	147,759 (11)	6	11
TOTAL	808,681 (89)	872,430 (94)	57	43
Votes per candidate	= 9,086	9,281		
STATE SENATOR	<u>REPUBLICAN</u>	<u>DEMOCRAT</u>		
	<u>cand.</u>	<u>cand.</u>		
22 opposed	378,873 (22)	404,230 (22)	11	11
3 unopposed	23,619 (1)	50,619 (2)	1	2
Votes per candidate	402,492 (23)	454,849 (24)	12	13
	= 17,500	18,952		

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[PLAINTIFF'S EXHIBIT 32]

Ranking of House Districts, 1982 Election Results

Rank	Demo.	Repub.	Dist.	Margin	% Demo.
1.	Clingan	_____	(42)	+15,724	100.0%
2.	Mosby	_____	(14)	+14,874 (2)	100.0%
3.	Goodall	_____	(34)	+14,749	100.0%
4.	D. Hume	_____	(63)	+14,298	100.0%
5.	Phillips	_____	(74)	+14,204	100.0%
6.	Brown	_____	(14)	+14,049 (2)	100.0%
7.	Katic	_____	(12)	+12,616.5 (2)	100.0%
8.	Robertson	_____	(70)	+12,547	100.0%
9.	Harris	_____	(12)	+12,292.5 (2)	100.0%
10.	Goble	_____	(67)	+11,942	100.0%
11.	Crawford	Geburh	(51)	+11,402.7 (3)	84.7%
12.	Day	Leonards	(51)	+11,394.3 (3)	84.7%
13.	Summers	Shaw	(51)	+11,355 (3)	84.5%
14.	Petterson	_____	(11)	+10,463 (2)	100.0%
15.	Heeke	Eddleman	(73)	+7,043	67.8%
16.	Bischoff	Grant	(68)	+6,605	67.9%
17.	P. Bauer	Melton	(7)	+6,513 (2)	70.0%
18.	Cook	Cervenka	(17)	+6,435	65.8%
19.	Kromkowski	Niezgodski	(7)	+6,312.5 (2)	69.3%
20.	Hays	Tabor	(77)	+6,215	71.8%
21.	Cochran	Wilson	(72)	+5,894	66.8%
22.	Hellman	Dees	(43)	+5,441	63.8%
23.	Hill	Jones	(66)	+5,162	64.5%
24.	Dobis	Gunning	(13)	+5,068	65.4%
25.	Jontz	Diener	(25)	+4,614	61.1%
26.	Roach	Pierce	(45)	+4,343	62.2%
27.	Hric	Becich	(11)	+4,199 (2)	64.0%
28.	Avery	Davis	(75)	+3,794.5 (2)	59.6%
29.	Snider	Gardner	(64)	+3,660	59.1%
30.	Lutz	Nix	(76)	+3,346	58.7%
31.	Campbell	Stewart	(37)	+3,020	58.0%
32.	Marshall	Pruett	(69)	+2,692	56.2%
33.	Bowser	England	(9)	+2,581.5 (2)	58.4%
34.	Underwood	Mikus	(55)	+2,189	56.2%
35.	Schultz	Poling	(61)	+1,782	57.3%

[PLAINTIFF'S EXHIBIT 32—Continued]

Rank	Demo.	Repub.	Dist.	Margin	% Demo.
36.	Tincher	Brighton	(46)	+1,212	53.1%
37.	Schuck	Johnson	(30)	+1,034	52.9%
38.	Klinker	Long	(27)	+901	52.4%
39.	Jones	Bradshaw	(26)	+897	53.0%
40.	Price	Aller	(5)	+891	53.2%
41.	Wilson	Collins	(10)	+770.5 (2)	52.6%
42.	Hayes	Craig	(59)	+728	51.8%
43.	Turner	Henderson	(31)	+547.5 (2)	51.7%
44.	Auer	Stephan	(21)	-302	49.3%
45.	Beery	Mishler	(22)	-521	48.5%
46.	Winger	Duckwall	(31)	-606.5 (2)	48.2%
47.	B. Bauer	Taylor	(8)	-766	47.9%
48.	Davis	Hoover	(33)	-1,193	46.8%
49.	Francekovic	Mangus	(6)	-1,334	46.5%
50.	Vandivier	Mullendore	(58)	-1,520	45.4%
51.	Potter	Wathen	(71)	-1,604	44.4%
52.	Glendening	N. Becker	(24)	-1,661	46.0%
53.	Sheets	Worden	(20)	-1,873.7 (3)	44.1%
54.	Esgate	Ayres	(10)	-1,922.5 (2)	44.2%
55.	Wright	Dean	(62)	-2,117	44.8%
56.	Gondeck	Budak	(9)	-2,174.5 (2)	43.0%
57.	Dieselberg	Regnier	(29)	-2,265	44.4%
58.	Gwyn	Fifield	(15)	-2,328 (2)	42.2%
59.	Szakaly	Bales	(60)	-2,391	43.1%
60.	Roe	Fox	(2)	-2,471	41.3%
61.	Orr	Harper	(50)	-2,614 (3)	42.5%
62.	Womack	Engle	(20)	-2,654.3 (3)	41.9%
63.	Landfair	Dailey	(35)	-2,785	42.2%
64.	Creech	Hibner	(56)	-2,778	41.0%
65.	White	V. Becker	(75)	-2,938 (2)	41.5%
66.	Charnstrom	Buell	(50)	-2,940 (3)	41.6%
67.	Bowen	Davis	(28)	-2,940	42.1%
68.	Holtan	Reppa	(15)	-2,944.5 (2)	40.5%
69.	Puro	Warner	(4)	-2,977	38.6%
70.	Roberts	Miller	(50)	-2,992.7 (3)	41.4%
71.	Seyfried	Schmidt	(52)	-3,034.3 (3)	41.7%
72.	Banning	Pond	(20)	-3,089 (3)	40.3%

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[PLAINTIFF'S EXHIBIT 32—Continued]

Rank	Demo.	Repub.	Dist.	Margin	% Demo.
73.	Handlon	Leeuw	(52)	-3,136.7 (3)	41.4%
74.	Barnets	Gabet	(19)	-3,200 (3)	39.1%
75.	C. Jones	Coleman	(54)	-3,234	40.8%
76.	McQueen	Dorbecker	(52)	-3,276.7 (3)	41.1%
77.	Ray	Harper	(19)	-3,277 (3)	38.9%
78.	Montgomery	Musselman	(23)	-3,398	40.5%
79.	Hopkins	Alderman	(19)	-3,433.3 (3)	38.4%
80.	Vandenbark	Bray	(47)	-3,456	38.5%
81.	Hayden	McIntyre	(65)	-3,459	40.5%
82.	Bowman	Keeler	(49)	-3,705.3 (3)	41.8%
83.	Merlau	Richardson	(53)	-3,759	39.5%
84.	Rodman	Spencer	(49)	-3,739.3 (3)	41.7%
85.	Turner	Kiely	(36)	-3,950	41.3%
86.	Kirchner	Thomas	(44)	-4,041	39.6%
87.	Svihlik	Mannweiler	(49)	-4,110.3 (3)	40.9%
88.	Coudret	Pool	(41)	-4,163	39.1%
89.	O'Rourke	Espich	(32)	-4,665	38.6%
90.	Dellinger	Burkley	(48)	-4,864.3 (3)	36.6%
91.	Richardson	Soards	(48)	-4,876 (3)	36.5%
92.	Graham	Nelson	(48)	-5,001 (3)	36.2%
93.	Baumgardner	Thompson	(40)	-5,411	33.6%
94.	Spelbring	Mock	(3)	-5,427	31.7%
95.	_____	Mauzy	(18)	-11,331	.0%
96.	_____	Roorda	(16)	-11,524	.0%
97.	_____	Gerig	(1)	-11,558	.0%
98.	_____	Moberly	(57)	-12,050	.0%
99.	_____	Dellinger	(38)	-12,217	.0%
100.	_____	Donaldson	(39)	-14,049	.0%

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[PLAINTIFF'S EXHIBIT 35]

Average of 1982 Election Results for Auditor and Court Clerk by House District				
	Cox-Evans	Loos-O'Laughlin	Total	% Demo.
1.	13,184	20,306	33,490	39.4%
2.	11,943	16,267	28,210	42.3%
3.	9,662	19,238	28,900	33.4%
4.	8,581	16,584	25,165	34.1%
5.	14,702	13,397	28,099	52.3%
6.	16,639	20,475	37,114	44.8%
7. (2)	42,284	22,250	64,534	65.5%
8.	16,512	18,598	35,110	47.0%
9. (2)	32,469	30,438	62,907	51.6%
10. (2)	30,047	31,671	61,718	48.7%
11. (2)	36,538	19,299	55,837	65.4%
12. (2)	47,851	9,293	57,144	83.7%
13.	18,757	12,262	31,019	60.5%
14. (2)	56,570	4,995	61,565	91.9%
15. (2)	27,312	31,307	58,619	46.6%
16.	13,160	18,905	32,065	41.0%
17.	20,468	18,816	39,284	52.1%
18.	10,169	20,149	30,318	33.5%
19. (3)	35,110	51,568	86,678	40.5%
20. (3)	42,563	53,330	95,893	44.4%
21.	18,678	22,072	40,750	45.8%
22.	13,503	19,679	33,182	40.7%
23.	15,000	19,946	34,946	42.9%
24.	18,033	22,523	40,556	44.5%
25.	17,734	22,163	39,897	44.4%
26.	11,191	16,953	28,144	39.8%
27.	17,042	19,635	36,677	46.5%
28.	14,347	21,637	35,984	39.9%
29.	17,262	21,766	39,028	44.2%
30.	18,369	16,246	34,615	53.1%
31. (2)	31,095	34,372	65,467	47.5%
32.	19,076	20,048	39,124	48.8%
33.	17,635	18,903	36,538	48.3%
34.	23,913	12,102	36,015	66.4%
35.	14,475	19,753	34,228	42.3%
36.	22,267	22,317	44,584	49.9%
37.	23,714	15,065	38,779	61.2%
38.	12,360	20,580	32,940	37.5%
39.	7,839	27,714	35,553	22.0%
40.	11,009	21,749	32,758	33.6%
41.	14,629	23,037	37,666	38.8%
42.	23,045	17,694	40,739	56.6%

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[PLAINTIFF'S EXHIBIT 35—Continued]

	Cox-Evans	Loos-O'Laughlin	Total	% Demo.
43.	23,385	15,322	38,707	60.4%
44.	17,809	19,266	37,075	48.0%
45.	21,474	12,461	33,935	63.3%
46.	19,335	18,885	38,220	50.6%
47.	11,054	18,141	29,195	37.9%
48. (3)	39,633	69,105	108,738	36.4%
49. (3)	56,739	78,980	135,719	41.8%
50. (3)	43,022	62,107	105,129	40.9%
51. (3)	82,094	15,783	97,877	83.9%
52. (3)	45,598	64,974	110,572	41.2%
53.	13,641	21,076	34,717	39.3%
54.	16,687	17,707	34,394	48.5%
55.	17,678	16,025	33,703	52.5%
56.	14,830	15,672	30,502	48.6%
57.	17,865	19,425	37,290	47.9%
58.	13,530	20,058	33,588	40.3%
59.	17,419	21,378	38,797	44.9%
60.	15,024	17,836	32,860	45.7%
61.	11,383	11,492	22,875	49.8%
62.	20,393	20,301	40,694	50.1%
63.	23,266	19,887	43,153	53.9%
64.	22,178	17,157	39,335	56.4%
65.	16,271	18,087	34,358	47.4%
66.	20,709	14,335	35,044	59.1%
67.	18,794	18,558	37,352	50.3%
68.	19,254	15,422	34,676	55.5%
69.	21,712	18,520	40,232	54.0%
70.	19,839	13,265	33,104	59.9%
71.	15,348	9,680	25,028	61.3%
72.	20,244	13,115	33,359	60.7%
73.	23,907	14,718	38,625	61.9%
74.	25,010	17,355	42,365	59.0%
75. (2)	34,883	39,808	74,691	46.7%
76.	21,177	16,154	37,331	56.7%
77.	20,223	10,535	30,758	65.7%
	1,728,145	1,717,692	3,445,837	50.15%

				% of Seats Demo- cratic
(1)	1,044,337	1,098,412	2,142,749	48.7%
(2)	339,049	223,433	562,482	60.3%
(3)	344,759	395,847	740,606	46.6%
(2 & 3)	683,808	619,280	1,303,088	52.5%
				33.3%

9a

[PLAINTIFF'S EXHIBIT 39]

Senate Ranking Based on 2 Race Average (50.15% Democratic)

1. MOSBY (3)	92.4%
2. CARSON (34)	81.1%
3. MRVAN (1)	80.4% *
4. MAHERN (33)	74.5%
5. BUSHEMI (4)	68.6% *
6. HUNT (10)	65.5%
7. BAIRD (46)	60.9% *
8. MONK (39)	60.5% *
9. O'DAY (49)	59.9% *
10. O'BANNON (47)	58.9% *
11. LEWIS (45)	57.9% *
12. CRAYCRAFT (26)	56.9% *
13. HUME (48)	56.3% *
14. Potesta (2)	54.7%
15. Nugent (43)	53.7% *
16. McCARTY (25)	53.4% *
17. Dunbar (38)	53.3% *
18. NEARY (8)	52.2%
19. TOWNSEND (19)	50.3% *
20. Corcoran (44)	50.3%
21. Hession (42)	49.3%
22. Niemeyer (6)	48.3% *
23. Server (50)	48.2%
24. Butcher (21)	48.0% *
25. Duckworth (40)	47.8%

20 seats were carried by better
than 50.15% statewide average

To carry half the seats requires
2.2% better than 50.15% or
about 52.35% of the vote state-
wide assuming the additional
vote is distributed equally state-
wide.

26. Jessup (20)	47.7%
27. NICHOLSON (27)	47.4% *
28. Costas (5)	47.0%
29. Pease (37)	46.4%

* = Elected in 1982 (per Exhibit 33)

[PLAINTIFF'S EXHIBIT 39—Continued]

30. Guy (7)	46.0%
31. Rogers (28)	45.3%
32. Miller (9)	44.7%
33. Zakas (11)	44.6% *
34. Justice (18)	44.4%
35. Snowden (17)	44.1% *
36. Garton (41)	43.9% *
37. GERY (22)	43.8% *
38. Harrison (23)	42.4% *
39. Sinks (16)	41.6%
40. Blankenbaker (30)	41.6%
41. MacDonald (15)	40.8% *
42. Vobach (31)	39.8% *
43. Worman (14)	39.2% *
44. Mills (35)	39.0%
45. Eosma (32)	38.8%
46. Augsburg (13)	38.6%
47. Borst (36)	38.6%
48. Shank (12)	37.0%
49. Parent (24)	32.8%
50. Duvall (29)	26.8% *

* = Elected in 1982 (per Exhibit 33)

FILED

MAR 15 1985

No. 84-1244

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,
Appellants,
v.

IRWIN C. BANDEMER, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana

**APPELLEES' MOTION TO STRIKE
THE AMICUS CURIAE BRIEF OF THE
MEMBERS OF THE CALIFORNIA DEMOCRATIC
CONGRESSIONAL DELEGATION**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

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SUSAN J. DAVIS, *et al.*,
v. *Appellants,*

IRWIN C. BANDEMER, *et al.*,
Appellees.

**On Appeal from the United States District Court
for the Southern District of Indiana**

**APPELLEES' MOTION TO STRIKE
THE AMICUS CURIAE BRIEF OF THE
MEMBERS OF THE CALIFORNIA DEMOCRATIC
CONGRESSIONAL DELEGATION**

INTRODUCTION

This motion is filed on behalf of the Bandemer plaintiffs-appellees.¹ Counsel for Bandemer plaintiffs received the Amicus Curiae Brief of the Members of the California Democratic Congressional Delegation ("the Delegation's amicus brief") on March 6, 1985.

Prior to filing their brief, counsel for the Delegation requested and received the consent of Bandemer plaintiffs to the filing of an amicus brief. At the time of that consent, however, Bandemer plaintiffs did not un-

¹ The parties are defined at p. 6 of appellees' Motion to Affirm filed March 1, 1985.

derstand that amici would attempt to inject into this case issues not raised by appellants in their Jurisdictional Statement and in large part not raised by any party to this litigation below. Nor was it understood that amici would ask this Court for summary vacation and remand on grounds that in appellees' view are not appropriately asserted in this case, whatever their merit in other litigation to which amici are parties. For these reasons, and because the amicus brief seeks to inject these issues in a procedural posture that would give no opportunity for any response from appellees (whom the amicus brief opposes, not supports), appellees withdraw their consent and file this motion to strike.²

ARGUMENT

I. No Voting Rights Act Claim Was Presented In This Case Below; Moreover, Even A Victory For The NAACP Plaintiffs Would Not Moot The Bandemer Plaintiffs' Claims

The case before the Court on this appeal is an action filed by Bandemer plaintiffs in January of 1982 (before the 1982 Voting Rights Act Amendments) alleging that

² As received by counsel for Bandemer appellees on March 6, 1985, the Delegation's amicus brief was accompanied by a motion for leave to file. Accordingly, Bandemer appellees prepared and printed an opposition to the motion for leave raising the matters presented in this motion to strike. Upon attempting to file that opposition on March 13 however, counsel was informed by the Clerk that the Delegation had withdrawn its motion for leave to file and instead was filing the amicus brief without a motion for leave on the grounds that subsequent to the initial submission of the amicus brief, accompanied by a motion for leave to file, all parties had consented to its filing. The Clerk also informed counsel that the Bandemer appellees' opposition could not be received for filing because there was no longer a motion pending to which the opposition related. Bandemer appellees have never been informed by the Delegation of this change in procedure. Bandemer appellees have recast and reprinted the opposition in the form of this motion to strike upon the advice of the Clerk that this is the only procedure available for bringing their views before the Court.

the Indiana Reapportionment Laws purposely and effectively discriminated against them as Democrats. No Voting Rights Act claim was asserted by the Bandemer plaintiffs. Indeed, four of the seven Bandemer plaintiffs are not members of any racial minority and could have no such claim. Approximately one month after the filing of the Bandemer case (and also before the 1982 Voting Rights Act Amendments), another case was filed in the Southern District of Indiana by the NAACP plaintiffs. That case did include claims of violations of the Voting Rights Act. The NAACP case is not on appeal here and the correctness of the district court's decision on that case is not before this Court. (See Jurisdictional Statement at 2 n.1.) Moreover, even if the NAACP plaintiffs had been successful on their Voting Rights Act claims, the district court would still have had to consider the Bandemer claims.³ A complete remedy of the racially based Voting Rights Act violations alleged by NAACP plaintiffs would not redress the wrong of which Bandemer plaintiffs complained—that the Indiana reapportionment scheme was designed to and has the effect of minimizing or cancelling out the voting strength of the political minority to which they belong.

II. Abstention Was Properly Rejected By The District Court And Would Be Wholly Improper Now

Similarly without merit is amici's argument that this case should be summarily vacated and returned to the

³ Because the issues addressed by amici and here include Voting Rights Act claims brought in *Indiana NAACP State Conference Of Branches v. Orr*, Cause No. IP-82-164C (S.D. Ind. 1984) which was consolidated with the Bandemer case below, counsel for Bandemer appellees have informed counsel for the NAACP plaintiffs of the substance of this opposition and are authorized to inform the Court that counsel for the NAACP plaintiffs agrees that the Bandemer plaintiffs' claims would not have been mooted even if the district court had found a violation of the Voting Rights Act in the NAACP case.

district court for consideration of state law claims under the *Pullman* doctrine of abstention. There is no uncertain state law issue to which anyone has pointed that would modify the laws in such a way as to render them constitutional. Abstention is simply not required, under these circumstances, "especially . . . where, as here, no state proceeding had been instituted or was pending when the District Court's jurisdiction was invoked." *Davis v. Mann*, 377 U.S. 678, 690-91 (1964). On this point, amici apparently confuse the situation presented by this case with the situation presented in another case before this Court in which amici are parties, *Badham v. The Secretary of State of the State of California*, No. 84-1226 (petition for cert. filed Jan. 30, 1985). *Badham* is a case involving federal and state law claims challenging congressional districting in California. Defendants in that federal litigation, however, promptly initiated parallel state court proceedings seeking to have state law claims adjudicated in state court. In that context, the district court abstained from deciding the federal constitutional issues pending resolution of the state law issues in that state court proceeding. The Ninth Circuit affirmed the district court's abstention. *Badham v. United States District Court for the Northern District of California*, 721 F.2d 1170 (9th Cir. 1983). Here, however, no state court proceedings are now or ever have been initiated for determination of those pendent state law claims included in the Bandemer plaintiffs' complaint. Defendants here, unlike their California counterparts, chose instead to drag out litigation in federal court for nearly three years during which time they never sought resolution of any issues in state court. No authority cited by amici requires or even suggests that abstention was or is now appropriate in these circumstances. *Davis v. Mann*, *supra*, is on point and controlling.

Further, defendants raised abstention below only after losing a variety of other dilatory motions.⁴ Even if abstention would have been proper at some early stage in the Bandemer litigation, it is clear that it is not proper now. This litigation has already continued without resolution through two (1982 and 1984) elections, thus depriving plaintiffs of participation in elections under a constitutional apportionment scheme for nearly half of the decade. This Court has long recognized that abstention should not operate to delay unduly ultimate adjudication on the merits where a fundamental right, like the right to vote, is at issue. *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); see also *Zwickler v. Koota*, 389 U.S. 241 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964). To reach the result urged by amici would turn the idea of abstention on its head, resulting in another three years of litigation and effectively denying plaintiffs any constitutional redress in this decade.

⁴ Defendants' "Motion to Dismiss or, in the Alternative, To Abstain" was filed on May 12, 1982 after the district court's denial on May 3, 1982 of an earlier motion to dismiss that was itself preceded by a motion to "reconstitute" the three judge court. On November 9, 1982 the defendants' motion to dismiss or abstain was unanimously denied.

CONCLUSION

Amici's efforts to impose their own procedural morass on this litigation should be rejected. Moreover, amici seek to raise procedural arguments in a posture in which no response is possible, notwithstanding amici's admittedly "brief review" of this record. The Delegation's amicus brief should be stricken.

Respectfully submitted,

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APR 15 1985

No. 84-1244

5

IN THE
Supreme Court of the United States

October Term, 1984

SUSAN J. DAVIS, *et al.*,

Appellants,

vs.

IRWIN C. BANDEMER, *et al.*,

Appellees.

**APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF INDIANA**

MOTION TO EXPEDITE CONSIDERATION

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IN THE Supreme Court of the United States

October Term, 1984

SUSAN J. DAVIS, *et al.*,

Appellants,

vs.

IRWIN C. BANDEMER, *et al.*;

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

MOTION TO EXPEDITE CONSIDERATION

Appellants, by counsel, respectfully move the Court for an order advancing oral argument in this cause so that it may be heard during the 1984 Term, and to expedite consideration of this case so that a decision may be rendered prior to the end of 1984 Term. In support of their motion, Appellants respectfully state that:

1. This appeal is taken from an order of the United States District Court for the Southern District of Indiana, sitting as a three-judge court, entered on December 13, 1984, which (a) declared unconstitutional under the Equal

Protection clause of the Fourteenth Amendment the 1981 Indiana House of Representatives and Senate reapportionment acts and the 1982 amendments thereto; (b) enjoined the Indiana state officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto in 1986 and thereafter; and (c) ordered the Indiana General Assembly to enact legislation in 1985 to redistrict the state and reapportion the legislative seats in the General Assembly. The decision was based solely upon a finding of partisan political gerrymandering and relied principally on the concurring opinion of Justice Stevens in *Karcher v. Daggett*, 462 U.S. 725 (1983) (Stevens, J., concurring). A copy of the decision and order appears in Appendix A to Appellants' Jurisdictional Statement.

2. On December 18, 1984, Appellants asked the court below to clarify its order in certain specific respects, including what priority to assign to its new constitutional prohibition against partisan political gerrymandering, which conflicts in certain important aspects with the priority of the Indiana General Assembly to preserve Black voting strength. The lower court denied this request on December 27, 1984. Copies of this motion and order appear at Appendices C and D, respectively, in the Jurisdictional Statement.

3. Appellants thereafter filed a Notice of Appeal in the lower court, and on March 25, 1985 this Court noted probable jurisdiction of the appeal.

4. On February 7, 1984, Appellants filed with this Court a Motion to Expedite Consideration, requesting the Court to expedite notation of probable jurisdiction and moving for an order advancing oral argument and setting an expedited briefing schedule. On February 19, 1985, the Court denied that portion of the motion which requested expedited consideration of the Jurisdictional Statement.

5. On April 5, 1985, Appellants filed with the court below a motion to stay the effect of the December 13, 1984 order pending resolution of this appeal. The court below has failed to act on that motion to date. A copy of the motion is attached as Exhibit A.

6. In order to facilitate expedited oral argument and disposition of this appeal, Appellants are undertaking to file with the Court within the next two weeks their Brief on the merits, which pursuant to Rule 35.1 is not due until May 9, 1985. Thus, even if the time within which Appellees must file their brief is not expedited by the Court, argument of this appeal may still be heard this Term should the Court agree to expedite this matter. Counsel for Appellants has previously submitted to the Court a letter, a copy of which is attached as Exhibit B, requesting on behalf of Appellants and Appellees Bandemer, *et al.* the earliest possible oral argument in this case. Counsel for Appellees Bandemer, *et al.* previously submitted a letter dated February 11, 1985 to the Clerk of this Court stating in its final paragraph that Appellees "have no objection to setting an expedited briefing schedule allowing this case to be heard during the current term." Appellants are also this day filing with Mr. Justice Stevens, as Circuit Justice for the Seventh Judicial Circuit, an Application for Stay in the event the Court does not wish to expedite this case. A copy of the Application (without exhibits) is attached as Exhibit C.

7. As discussed at greater length in the Jurisdictional Statement and Appellants' Brief on the merits, there is a reasonable probability that this Court will reverse and vacate the decision of the court below, which attempted to make new law in recognizing as justiciable a claim of partisan political gerrymandering and in upholding that claim on the record presented. *See, e.g., Wiser v. Hughes*, 459 U.S. 962 (1982) (dismissing for want of a substantial federal question an appeal alleging political gerrymandering); *Karcher v. Daggett*, 462 U.S. 725 (1983) (Stevens, J., concurring) (suggesting the necessary

showing for any such gerrymandering claim). In fact, the court below recognized the novelty of its holding (Appendix to Jurisdictional Statement, at A-21, A-22). That holding, and this Court's review of it, could have a substantial effect on reapportionment and elections throughout the United States to which the Equal Protection Clause has been held to apply. See *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 n. 11 (1977) (county government election); *Hadley v. Junior College District of Kansas City*, 397 U.S. 50 (1970) (elected junior college trustees); *Avery v. Midland County*, 390 U.S. 474 (1968) (elected county commissioners). As the primary and general elections of 1986 approach, an expedited decision becomes increasingly important.

8. The effect of the lower court's decision and this Court's timetable in reviewing it are especially acute with respect to Indiana. Because of this continuing litigation, great confusion and uncertainty exists in the minds of Indiana voters and members of the General Assembly regarding the validity of Indiana's reapportionment acts and the future configuration of the electoral districts in which state senators and representatives and their challengers will be campaigning and in which the general public will be voting in 1986.

9. Moreover, Article 4, Section 7 of the Indiana Constitution requires Senators and Representatives to live in their districts for one year preceding their election:

No person shall be a Senator or a Representative, who, at the time of his election, is not a citizen of the United States; nor any one who has not been for two years next preceding his election, an inhabitant of this State, and, for one year next preceding his election, an inhabitant of the district whence he may be chosen. Senators shall be at least twenty-five, and Representatives at least twenty-one years of age.

Thus, absent a stay of the lower court's order, if this Court does not resolve this appeal during this Term, grave

questions could arise regarding the effect of this state constitutional provision on the validity of any electoral districts which might have to be created less than one year from the November, 1986 elections.

10. Absent a stay of the lower court's injunctive order, Appellants respectfully state that they must have a decision on the merits of this appeal during this Term. By memorandum dated March 25, 1985, the Clerk of this Court has advised counsel that unless expedited by the Court, this case will probably be heard in the October Term, 1985. Counsel have been informally advised by telephone that oral argument will likely be scheduled for the month of October. The probability thus exists that unless expedited, this appeal may not be decided in time to allow the Indiana General Assembly to act, if necessary, pursuant to the Court's guidance before the May 6, 1986 primary or February 5, 1986, the first day to file declarations of candidacy for the 1986 primary election (Ind. Code §§3-1-9-4,5).¹

11. Members of this Court have previously recognized the emergency nature of judicial review in cases involving election laws, e.g. *Shub v. Simpson*, 340 U.S. 861 (1950) (Vinson, C.J., Black and Douglas, J.J., dissenting); *MacDougall v. Green*, 335 U.S. 281 (1948) (Rutledge, J., concurring), and consideration of such cases has been expedited, e.g., *Williams v. Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers). Such concerns are equally applicable to this case.

¹ The Indiana General Assembly is a citizen legislature which is only in session for a limited period of time each year. In odd-numbered years it meets in regular session for a maximum of 61 session days, beginning in January and ending no later than April 30. Ind. Code §2-2.1-1-2. In even-numbered years it meets in regular session for a maximum of 30 session days. Ind. Code §2-2.1-1-3.

12. If the Court does not expedite oral argument and consideration of the pending appeal, the Indiana legislature will be forced by the lower court's order to create new legislative districts before the end of the year (*see* Jurisdictional Statement Appendix at A-33). As pointed out by Judge Pell in his dissenting opinion regarding the Motion to Amend, it will be difficult for the Indiana legislature "to discern what [the lower court's] opinion is saying should be done" (Jurisdictional Statement Appendix at A-64) and to draw new districts without, for example, diluting the votes of Indiana's Black voters (*see* Jurisdictional Statement Appendix at A-59). Moreover, after new election machinery and districts were in place, a subsequent decision by the Court upholding the present apportionment acts would create chaotic confusion to Indiana voters and unfairness to political candidates or officeholders.

13. In *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers) Justice Brennan concluded that the state would suffer irreparable harm from a forced redistricting pending appeal:

As to the third Rostker requirement, I conclude that applicants would plainly suffer irreparable harm were the stay not granted. Under the District Court order the legislature must either adopt an alternative redistricting plan before March 22 next or face the prospect that the District Court will implement its own redistricting plan. With respect to the balance of the equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans.

Id. at 1306-07.

Similarly, Indiana would suffer the harm recognized by Justice Brennan were the General Assembly forced to adopt an alternative redistricting plan prior to the decision by the Court on this appeal.

WHEREFORE, Appellants, by counsel, respectfully move the Court for an order advancing oral argument in this cause so that it may be heard during the 1984 Term, and to expedite consideration of this case so that a decision may be rendered prior to the end of the 1984 Term.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IRWIN C. BANDEMER, et al.,
Plaintiffs,

v.

SUSAN J. DAVIS, et al.,
Defendants.

CAUSE NO. IP 82-56-C

INDIANA N.A.A.C.P. STATE
CONFERENCE OF BRANCHES,
et al,

Plaintiffs,

v.

ROBERT D. ORR, Governor,
State of Indiana, et al.,
Defendants.

CAUSE NO. IP 82-164-C

MOTION FOR STAY PENDING APPEAL

Defendants, Susan J. Davis, John Livengood, and Thomas S. Milligan, as members of the Indiana State Election Board, Laurie Potter Christie, as Executive Director of the Indiana State Election Board, and Edwin J. Simcox, Secretary of State of the State of Indiana, by counsel, move the Court pursuant to Rule 62(c), Federal Rules of Civil Procedure, for entry of an

EXHIBIT A

order staying the effectiveness of this Court's order of December 13, 1984 pending appeal of the order to the United States Supreme Court. In support of their motion, Defendants respectfully state that:

1. On December 13, 1984 this Court entered an order which (a) declared unconstitutional under the Equal Protection clause of the Fourteenth Amendment the 1981 Indiana House of Representatives and Senate reapportionment acts and the 1982 amendments thereto; (b) enjoined the Indiana State officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto in 1986 and thereafter; and (c) ordered the Indiana General Assembly to enact legislation in 1985 to redistrict the state and reapportion the legislative seats in the General Assembly.

2. Defendants thereafter filed a notice of appeal with this Court, and on March 25, 1985, the United States Supreme Court noted probable jurisdiction of the appeal.

3. Rule 62(c), Federal Rules of Civil Procedure, permits this Court to suspend the operation of its injunction entered December 13, 1984 during the pendency of the appeal. Prior cases have established four considerations for entry of such a stay. An applicant must show (i) some likelihood that he will prevail on appeal, (ii) the possibility of irreparable

injury from denial of a stay, (iii) the absence of harm to the opposing party from entry of a stay, and (iv) that a stay is in the public interest. E.g., Adams v. Walker, 488 F.2d 164 (7th Cir. 1973). These factors do not, however, provide a mechanistic formula since the grant of a stay is within the discretion of the court. E.g., Jordan v. Wolke, 463 F.Supp. 641 (E.D. Wis. 1978).

4. In this Court's opinion, it recognized that in holding Indiana's reapportionment acts unconstitutional on the basis of partisan political gerrymandering, it was making new law in recognizing as justiciable a claim of partisan political gerrymandering and in upholding that claim on the record presented. In fact, this Court correctly stated that the Supreme Court had not yet approved such a claim and that no apportionment plan had ever been found unconstitutional because it discriminated against a political group. The Supreme Court has, however, dismissed for want of a substantial question, an appeal alleging political gerrymandering, Wiser v. Hughes, 459 U.S. 962 (1982), and has affirmed decisions holding such claims nonjusticiable, e.g., WMCA, Inc. v. Lomenzo, 238 F.Supp. 916 (S.D.N.Y. 1965), aff'd, 382 U.S. 4 (1965). By noting probable jurisdiction of the Defendants' appeal in this case, the Supreme Court is signaling that there is at least a fair possibility that Defendants will be successful on the merits of their appeal. Indeed, a stay is justified simply by the lack

of precedent for such a constitutional decision which could affect the state's political processes. See Republican State Central Committee v. Ripon Society, Inc., 409 U.S. 1222 (1972) (Rehnquist, J., in chambers).

5. The denial of a stay could cause irreparable harm to citizens of the State of Indiana if the United States Supreme Court is unable to decide this appeal on an expedited basis. Because of this continuing litigation, great confusion and uncertainty exists in the minds of Indiana voters and members of the General Assembly regarding the validity of Indiana's apportionment acts and the future configuration of the electoral districts in which state senators and representatives and their challengers will be campaigning and in which the general public will be voting in 1986. In addition, Article 4, Section 7 of the Indiana Constitution requires senators and representatives to live in their districts for one year preceding their election:

No person shall be a Senator or a Representative, who, at the time of his election, is not a citizen of the United States; nor any one who has not been for two years next preceding his election, an inhabitant of this State, and, for one year next preceding his election, an inhabitant of the district whence he may be chosen. Senators shall be at least twenty-five, and Representatives at least twenty-one years of age.

Thus, if this Court's order is not stayed and the appeal is not resolved by the Supreme Court during its current term, grave questions could arise regarding the effect of this state

constitutional provision on the validity of any electoral districts which might have to be created less than one year from the November, 1986 elections.

6. By memorandum dated March 25, 1985, the Clerk of the Supreme Court advised counsel that unless expedited by the Supreme Court, this appeal will probably be heard in the October Term, 1985. Counsel has been informally advised by telephone that oral argument will likely be scheduled for the month of October. The possibility thus exists that unless expedited, the appeal may not be decided in time to allow the Indiana General Assembly to act, if necessary, pursuant to the Supreme Court's guidance even before the May 6, 1986 primary or February 5, 1986, the first day to file declarations of candidacy for the 1986 primary election (Ind. Code §§3-1-9-4,5).

7. Members of the Supreme Court have previously recognized the irreparable harm which can occur absent a stay in cases involving elections and the political process. In Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers) Justice Brennan concluded that the state would suffer irreparable harm from a forced redistricting pending appeal:

As to the third Rostker requirement, I conclude that applicants would plainly suffer irreparable harm were the stay not granted. Under the District Court order the legislature must either adopt an alternative redistricting plan before March 22 next or face the prospect that the District Court will implement its own redistricting plan. With respect to the balance of the equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans.

Id. at 1306-07

Similarly, Indiana would suffer the harm recognized by Justice Brennan were the General Assembly forced to adopt an alternative redistricting plan prior to the decision by the Supreme Court on the appeal.

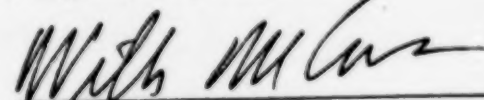
8. Plaintiffs will suffer no harm from entry of a stay in this case. Justice Powell has pointed out that merely "prolonging" a remedy such as that sought and obtained by Plaintiffs in this case is not a basis to deny a stay. Wise v. Lipscomb, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers). Significantly, this Court allowed the November, 1984 general elections to proceed under the current apportionment acts, and the Supreme Court has approved the interim use of apportionment acts found invalid to avoid disruption of the election process. See, e.g., Reynolds v. Sims, 377 U.S. 533, 585 (1964).

9. On the other hand, the public has a considerable interest in allowing the plan of apportionment formulated by their elected representatives to remain in effect pending the appeal, Gaffney v. Cummings, 412 U.S. 735 (1973); Burns v. Richardson, 384 U.S. 73 (1966), and in allowing the state's political process to function free of judicial supervision, O'Brien v. Brown, 409 U.S. 1 (1972). Additionally, of course, the public has a substantial interest in alleviating the confusion and uncertainty which exists regarding the 1986 election.

WHEREFORE, Defendants respectfully move this Court pursuant to Rule 62(c), Federal Rules of Civil Procedure, for

entry of a stay suspending the operation of this Court's December 13, 1984 injunction pending the disposition of the appeal to the United States Supreme Court.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Motion for Stay Pending Appeal" has been served upon Theodore R. Boehm, Esq., Christopher G. Scanlon, Esq., and John B. Swarbrick, Jr., Esq., 810 Fletcher Trust Building, Indianapolis, Indiana, 46204; Dennis C. Hayes, Esq., 36 South Pennsylvania, Suite 450,

Indianapolis, Indiana, 46204, by personal service and upon
Thomas I. Atkins, Esq. and Michael H. Sussman, Esq., 186 Remsen
Street, Brooklyn, New York, 11201 by Federal Express mail this
5th day of April, 1985.

WME/ME

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Attention: Ms. Sandy Nelson

Re: Davis v. Bandemer
Cause No. 84-1244

Dear Ms. Nelson:

This letter is to confirm the substance of the recent telephone conversations you have had with the writer and Mr. Scanlon.

As explained to you in these conversations, Davis v. Bandemer is a case involving the legislative districting of the State of Indiana. Because disposition of the case by the Court may effect the districts under which elections are held in 1986, counsel for both appellees Bandemer, et al. and counsel for appellants Davis, et al. are anxious that the case be scheduled for argument at the earliest possible date.

Mr. Scanlon and I appreciate very much whatever consideration you are able to give to our scheduling request.

Sincerely,

William M. Evans
Counsel for Appellants
Davis, et al.

WME/dbg

cc: Christopher G. Scanlon, Esq.
One of the Attorneys for
Appellees Bandemer, et al.

EXHIBIT B

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

Susan J. Davis, et al.,

Appellants

vs.

Irwin C. Bandemer, et al.,

Appellees.

ON APPEAL FROM A THREE-JUDGE PANEL
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

APPLICATION FOR STAY

To the Honorable John Paul Stevens, Associate Justice of
the Supreme Court of the United States and Circuit Justice for
the Seventh Judicial Circuit:

Appellants, by counsel, respectfully apply pursuant to
Supreme Court Rule 44 for an order staying the December 13,
1984 order of the three-judge panel in the Southern District of
Indiana pending a final disposition of the appeal to this
Court, in the event this Court does not expedite consideration
of this appeal as prayed in the Motion to Expedite
Consideration contemporaneously filed with this Court. In
support of their application, Appellants respectfully
state that:

1. This appeal is taken from an order of the United
States District Court for the Southern District of Indiana,
sitting as a three-judge court, entered on December 13, 1984,

EXHIBIT C

which (a) declared unconstitutional under the Equal Protection clause of the Fourteenth Amendment the 1981 Indiana House of Representatives and Senate reapportionment acts and the 1982 amendments thereto; (b) enjoined the Indiana state officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto in 1986 and thereafter; and (c) ordered the Indiana General Assembly to enact legislation in 1985 to redistrict the state and reapportion the legislative seats in the General Assembly. The decision was based solely upon a finding of partisan political gerrymandering and relied principally on the concurring opinion in Karcher v. Daggett, 462 U.S. 725 (1983) (Stevens, J., concurring). A copy of the decision and order is attached hereto as Exhibit "A" and also appears in Appendix A to Appellants' Jurisdictional Statement.

2. On December 18, 1984, Appellants asked the court below to clarify its order in certain specific respects, including what priority to assign to its new constitutional prohibition against partisan political gerrymandering, which conflicts in certain important aspects with the priority of the Indiana General Assembly to preserve Black voting strength. The lower court denied this request on December 27, 1984. Copies of this motion and order appear at Appendices C and D, respectively, in the Jurisdictional Statement.

3. Appellants thereafter filed a Notice of Appeal in the lower court, and on March 25, 1985 this Court noted probable jurisdiction of the appeal.

4. On February 7, 1984, Appellants filed with this Court a Motion to Expedite Consideration, requesting the Court to expedite notation of probable jurisdiction and moving for an order advancing oral argument and setting an expedited briefing

schedule. On February 19, 1985, the Court denied that portion of the motion which requested expedited consideration of the Jurisdictional Statement.

5. On April 5, 1985, Appellants filed with the court below a motion to stay the effect of the December 13, 1984 order pending resolution of this appeal. The court below has failed to act on that motion to date. A copy of the motion is attached as Exhibit "B".

6. In order to facilitate expedited consideration and disposition of this appeal, Appellants are contemporaneously filing with the Court a Motion for Expedited Consideration and undertaking to file early their Brief on the merits. Counsel have previously submitted to the Court a letter requesting the earliest possible oral argument on this case. Copies of the Motion for Expedited Consideration and the letter of counsel are attached as Exhibits "C" and "D", respectively.

7. Prior cases from this Court have established a four-part test for entry of a stay. An applicant must show (i) there is a reasonable probability that the case will be accepted for review, (ii) there is a fair prospect that the Court will conclude the decision below was erroneous, (iii) irreparable harm is likely to result from denial of a stay, and (iv) in a close case, the equities, including the interests of the public at large, favor a stay. Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers); Rostker v. Goldberg, 448 U.S. 1306 (1980) (Brennan, J., in chambers).

8. Probable jurisdiction of this appeal has previously been noted, thus satisfying the first part of the test, and Justice Brennan has recognized that a necessary overlap exists between the first two parts of the test. Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers). Moreover, as discussed at greater length in the Jurisdictional Statement and

Appellants' Brief on the merits, there is a reasonable probability this Court will reverse and vacate the decision of the court below, which attempted to make new law in recognizing as justiciable a claim of partisan political gerrymandering and in upholding that claim on the record presented. See, e.g., Wiser v. Hughes, 459 U.S. 962 (1982) (dismissing for want of a substantial federal question an appeal alleging political gerrymandering); Karcher v. Daggett, 462 U.S. 725 (1983) (Stevens, J., concurring) (suggesting the necessary showing for any such gerrymandering claim). The lack of precedent for constitutional decisions in the political arena has previously justified entry of a stay. Republican State Central Committee v. The Ripon Society, Inc., 409 U.S. 1222 (1972) (Rehnquist, J., in chambers); O'Brien v. Brown, 409 U.S. 1 (1972).

9. If Appellants' Motion for Expedited Consideration is not granted, the denial of a stay would cause irreparable harm to citizens of the State of Indiana. Because of this continuing litigation, great confusion and uncertainty exists in the minds of Indiana voters and members of the General Assembly regarding the validity of Indiana's^{re} apportionment acts and the future configuration of the electoral districts in which state senators and representatives and their challengers will be campaigning and in which the general public will be voting in 1986.

10. Moreover, Article 4, Section 7 of the Indiana Constitution requires Senators and Representatives to live in their districts for one year preceding their election:

No person shall be a Senator or a Representative, who, at the time of his election, is not a citizen of the United States; nor any one who has not been for two years next preceding his election, an inhabitant of this State, and, for one year next preceding his election, an inhabitant of the district whence he may be chosen. Senators

shall be at least twenty-five, and Representatives at least twenty-one years of age.

Thus, if this Court does not resolve this appeal during this Term, and the lower court's order is not stayed, grave questions could arise regarding the effect of this state constitutional provision on the validity of any electoral districts which might have to be created less than one year from the November, 1986 elections.

11. Appellants respectfully state that they must either have a decision on the merits of this appeal during this Term, or the lower court's order must be stayed. By memorandum dated March 25, 1985, the Clerk of this Court has advised counsel that unless expedited by the Court, this case will probably be heard in the October Term, 1985. Counsel have been informally advised by telephone that oral argument will likely be scheduled for the month of October. The possibility thus exists that unless expedited, this appeal may not be decided in time to allow the Indiana General Assembly to act, if necessary, pursuant to the Court's guidance even before the May 6, 1986 primary or the March 7, 1986 filing deadline (Ind. Code §§3-1-9-4, 5).¹ In addition, it is likely that vacancies will occur in legislative districts, prior to the 1986 elections. Unless the lower court's order is stayed, such vacancies in the presently constituted districts could not be filled until 1986, leaving the citizens in such districts unrepresented in the meantime.

¹ The Indiana General Assembly is a citizen legislature which is only in session for a limited period of time each year. In odd-numbered years it meets in regular session for a maximum of 61 session days, beginning in January and ending no later than April 30. Ind. Code §2-2.1-1-2. In even-numbered years it meets in regular session for a maximum of 30 session days. Ind. Code §2-2.1-1-3.

12. Members of this Court have previously recognized the irreparable harm which can occur absent a stay in cases involving elections and the political process. In Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers) Justice Brennan concluded that the state would suffer irreparable harm from a forced redistricting pending appeal:

As to the third Rostker requirement, I conclude that applicants would plainly suffer irreparable harm were the stay not granted. Under the District Court order the legislature must either adopt an alternative redistricting plan before March 22 next or face the prospect that the District Court will implement its own redistricting plan. With respect to the balance of the equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans.

Id. at 1306-07.

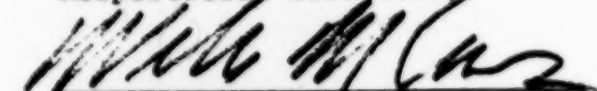
Similarly, Indiana would suffer the harm recognized by Justice Brennan were the General Assembly forced to adopt an alternative redistricting plan prior to the decision by the Court on this appeal. Regarding potential candidates who might be affected by the Indiana constitutional provision, Justice Black determined in Davis v. Adams, 400 U.S. 1203 (1970) (Black, J., in chambers) that unconstitutional deprivation of the right to run for office constituted sufficient irreparable harm to justify a stay. See also Whitcomb v. Chavis, 396 U.S. 1055, 1064- (1970) (granting and refusing to vacate or modify a stay).

13. The balance of equities in this case, including the interests of the public, Rostker v. Goldberg, 448 U.S. 1306 (1980) (Brennan, J., in chambers), clearly favors the granting of a stay if an expedited decision cannot be obtained. The potential harm to the state, to potential candidates for office, and to the state's voters absent a stay has been discussed above. Appellees will suffer no harm from entry of a stay. Justice Powell has previously pointed out that merely

"prolonging" the remedy sought by Appellees is not a basis to deny a stay. Wise v. Lipscomb, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers). Significantly, the lower court allowed the November, 1984 general elections to proceed under the current reapportionment acts, and this Court has approved the interim use of reapportionment acts found invalid to avoid disruption of the election process. See, e.g., Reynolds v. Sims, 377 U.S. 533, 585 (1964). The public also has a considerable interest in allowing the plan of apportionment formulated by their elected representatives to remain in effect pending this appeal, Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers); Gaffney v. Cummings, 412 U.S. 735 (1973), and in allowing the state's political process to function free of judicial supervision, O'Brien v. Brown, 409 U.S. 1 (1972).

WHEREFORE, in the event this Court does not wish to expedite consideration of this appeal, Appellants respectfully apply for an order staying the December 13, 1984 order of the three-judge panel sitting in the Southern District of Indiana pending a final disposition of the appeal to this Court.

Respectfully submitted,



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(3)
No. 84-1244

Office - Supreme Court, U.S.

FILED

MAR 4 1985

ALEXANDER L. STEVENS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, et al.,
Appellants,

VS.

IRWIN C. BANDEMER, et al.,
Appellees.

**Appeal From The United States District Court
For The Southern District Of Indiana**

BRIEF AMICUS CURIAE OF ASSEMBLY OF THE STATE OF CALIFORNIA PRIOR TO CONSIDERATION OF JURISDICTION

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25/142

QUESTION PRESENTED

Whether the justiciability of partisan gerrymandering should be approved without plenary consideration by this Court when (1) no court, including the one below, has expressly considered the constitutional implications and substantial difficulties inherent in judicial review of such claims and (2) summary acceptance of justiciability would approve standardless inquiries into the internal processes of state legislatures and the subjective motives of individual state legislators.

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No. 84-1244

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, et al.,
Appellants,

VS.

IRWIN C. BANDEMER, et al.,
Appellees.

**Appeal From The United States District Court
 For The Southern District Of Indiana**

**BRIEF AMICUS CURIAE OF
 ASSEMBLY OF THE STATE OF CALIFORNIA
 PRIOR TO CONSIDERATION OF JURISDICTION**

INTEREST OF AMICUS

Amicus curiae is the duly constituted Assembly of the State of California and submits this brief pursuant to Supreme Court Rule 36.1.

The ruling of the Indiana district court, if sustained, would cast doubt upon reapportionment plans in every state in the Union. California, whose Constitution calls for reapportionment but once each decade, has for the first half of this decade had a series of legislative, judicial and election battles over its Assembly, Senate and Congressional districts. Although litigation over the Congressional plan continues, see *Badham v. Eu*, No. 85-1226, *petition for writ of certiorari pending*, *amicus* had thought that all challenges to the legislative plans had been resolved. If the decision below is affirmed, California can expect further divisive litigation over reapportionment.

Repeated attacks on the validity of districting plans inevitably distract legislators from the pressing needs of California government and generate great uncertainty at all levels of state government. In addition, the decision below appears to open the way for widespread inquiry—by discovery, deposition and trial testimony—into the intent of individual legislators.

SUMMARY OF THE ARGUMENT

The district court failed to address in any way a far-reaching and fundamental threshold question: whether claims of partisan gerrymandering are justiciable. The court misconstrued the separate opinions in *Karcher v. Daggett*, ____ U.S. ____, 103 S.Ct. 2653 (1983), failed to consider the additional opinions in *Karcher v. Daggett*, ____ U.S. ____, 104 S.Ct. 1691 (1984), and ignored prior decisions of this Court to the effect that partisan gerrymandering is not justiciable. *Jiminez v. Hidalgo County Water District No. 2*, 424 U.S. 950 (1976); *WMCA, Inc. v. Lorenzo*, 382 U.S. 4 (1965).

An order affirming the decision below or even dismissing the appeal for want of a substantial federal question would be a decision on the merits by this Court. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). Such a decision would be viewed as changing *sub silentio* a long line of cases holding that partisan gerrymandering is not justiciable. At best it would throw the lower courts and state legislatures into confusion.

This Court should vacate and remand for full consideration of justiciability in light of pre-existing precedent. See *Upham v. Seamon*, 456 U.S. 37, 44 (1982) (*per curiam*). On a new appeal this Court would then have the benefit of the district court's full analysis on the justiciability issue. See *Taylor v. McKeithen*, 407 U.S. 191, 194 (1972). Additionally, the district court, on remand, may dispose of the case on non-constitutional grounds. *Escambia County, Florida, et al. v. Henry T. McMillan*, ____ U.S. ____, 104 S.Ct. 1577 (1984).

If this Court does not vacate and remand, it should note probable jurisdiction and give the case plenary consideration. Plenary consideration is essential to permit informed review of

the difficulties involved in establishing standards for judicial review of political gerrymandering claims. No reapportionment plan is politically neutral. *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973). Identifying members of a "salient" political class is virtually impossible. *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971). The proposed standards for measuring adverse political impact are laden with hidden policy judgments and generally unworkable. And any effort to determine discriminatory intent in political cases would inject federal courts into the internal affairs of state legislatures and precipitate otherwise prohibited inquiries into the subjective intent of individual legislators. See *United States v. O'Brien*, 391 U.S. 367, 383-85 (1968).

ARGUMENT

The district court in a divided opinion invalidated Indiana's legislative districting plans as unconstitutional political gerrymanders. It did so without ever considering whether political gerrymandering is a justiciable question.

The district court's failure to address justiciability is inexplicable in the face of a large body of law—including decisions of this Court—holding political gerrymandering nonjusticiable. That authority would support summary reversal of the district court's decision. However, *amicus* suggests that the case first be vacated and remanded to the district court for its views on the justiciability question and for potential disposition on non-constitutional grounds.

I

THIS COURT SHOULD VACATE THE JUDGMENT BELOW AND REMAND FOR FURTHER CONSIDERATION

Either summary affirmance or dismissal of this appeal could be read to resolve *sub silentio* one of the major justiciability controversies of our time.¹ This would be in sharp contrast to this

¹ Lower courts would, of course, be required to consider a summary disposition as binding precedent of this Court. *Tully v. Griffin, Inc.*,

Court's careful and extended treatment of justiciability in *Baker v. Carr*, 369 U.S. 186 (1962). That case not only was argued twice but also had the benefit of a thorough and thoughtful discussion of justiciability by the three-judge court below, a discussion which this Court mentioned and analyzed repeatedly. See *Baker v. Carr*, 179 F.Supp. 824, 826-28 (M.D. Tenn. 1959) (*per curiam*) (three-judge court), *rev'd*, 369 U.S. 186 (1962).

It is precisely the absence of any such elucidation from the three-judge court in this case which prompts *amicus* to suggest that the best disposition this Court could make of the appeal is to vacate the judgment and remand the matter to the district court for reconsideration.

The district court did not discuss justiciability, although the district court majority in reaching its decision did rely on Justice Stevens' concurring opinion in *Karcher v. Daggett*, ____ U.S. ____, 103 S.Ct. 2653 (1983). That concurrence and Justice Powell's separate dissenting opinion argue for judicial review of political gerrymandering. 103 S.Ct. at 2667-78, 2687-90. The dissenting opinion of Justice White mentions "racial or political groups" in a general discussion of persons protected by the Fourteenth Amendment. Justice Stevens interpreted this to mean that Justice White "seems to agree that New Jersey's plan would violate the Equal Protection Clause if it 'invidiously discriminated against a racial or political group.'" *Karcher v. Daggett*, *supra*, 103 S.Ct. at 2669. Some observers understood the combination of opinions, including the fact that the Chief Justice and Justice Rehnquist joined in Justice White's dissent, to mean that there were five votes in favor of justiciability.

Support for this conclusion disappeared, however, with the issuance of opinions from this Court on application for a stay from subsequent orders by the three-judge court in *Karcher v. Daggett*. Justice Brennan, dissenting, asserted that this Court has

429 U.S. 68, 74 (1976); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). "[V]otes to affirm summarily, and to dismiss for want of substantial federal question... are votes on the merits of a case." *Hicks v. Miranda*, *supra*, 422 U.S. at 344, quoting from *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959).

"never concluded... that the existence or noncompact or gerrymandered districts is by itself a constitutional violation." *Karcher v. Daggett*, ____ U.S. ____, 104 S.Ct. 1691, 1696-97 (1984). Justices White and Marshall joined in Justice Brennan's unequivocal statement. This dissent suggests that Justice White is not among those who consider political gerrymandering justiciable. And it casts doubt on the claim that the Chief Justice and Justice Rehnquist favor justiciability.²

Of course the members of this Court know what they meant to say. The foregoing simply demonstrates that the issue is far more complex than the district court thought.

Moreover, the district court completely ignored two previous decisions of this Court summarily affirming three-judge district court rulings that partisan gerrymandering is not justiciable. *Jiminez v. Hidalgo County Water Improve. Dist. No. 2*, 68 F.R.D. 668 (S.D. Tex. 1975), *aff'd mem.*, 424 U.S. 950 (1976); *WMCA, Inc. v. Lomenzo*, 238 F.Supp. 916 (S.D.N.Y.), *aff'd*, 382 U.S. 4 (1965) (*per curiam*).³ Acknowledging the binding effect of this Court's summary decisions, *Hicks v. Miranda*, *supra*, 422 U.S. at 344, lower courts have consistently and correctly relied on *WMCA* and *Jiminez* for the principle that political gerrymandering is either not justiciable or otherwise not

² That doubt is confirmed, at least as to single member districts, by Justice Rehnquist's dissent, joined by the Chief Justice, in *Mississippi Republican Executive Committee v. Brooks*, ____ U.S. ____, 105 S.Ct. 416, 422 (1984) (*mem.*).

³ The Court has indicated in *dicta* that political gerrymandering may be justiciable in the context of *multi-member districting systems*. See *Gaffney v. Cummings*, 412 U.S. 735, 751, 754 (1973); *White v. Regester*, 412 U.S. 755, 765, 769 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 143-44 (1971); *Burns v. Richardson*, 384 U.S. 73, 88-89 (1966). The holdings in these cases do not, however, support a rule of justiciability. Nor do these cases, even in *dicta*, support the justiciability of partisan gerrymandering claims in plans with single member districts. Although the Indiana apportionment plans include some multi-member districts, the district court did not limit its consideration or statement of the law to multi-member districts.

a cognizable constitutional claim.⁴ In fact, though the reasoning varies, no lower court has previously sustained a claim of political gerrymandering.⁵

The district court utterly failed to address this body of law. Therefore, vacation and remand for further consideration is very much in order.

While the remedy of vacating and remanding is usually employed to permit the lower court to consider a new and intervening ruling, it is by no means limited to that situation. It is not uncommonly used to permit a lower court to consider older precedent that it has failed to address. *See, e.g., Upham v. Seamon*, 456 U.S. 37, 44 (1982) (*per curiam*) (finding three-judge court had misinterpreted long-standing reapportionment ruling but vacating and remanding for relief in light of lower court's greater familiarity with upcoming state election requirements); *Bailey v. Patterson*, 369 U.S. 31, 34 (1962) (*per curiam*) (vacating and remanding to abstaining three-judge court for reconsideration in light of long extant precedents). This Court also commonly vacates and remands in order to receive the benefit of a lower court analysis not yet made. *See, e.g., Taylor v.*

⁴ *See Russo v. Vacin*, 528 F.2d 27, 29 (7th Cir. 1976); *Cousins v. City Council of City of Chicago*, 466 F.2d 830, 844 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972); *Wendler v. Stone*, 350 F.Supp. 838, 840 (S.D. Fla. 1972); *Skolnick v. Mayor and City Council of Chicago*, 319 F.Supp. 1219, 1228 (N.D. Ill. 1970); *Wells v. Rockefeller*, 273 F.Supp. 984, 987, (S.D.N.Y.) *aff'd mem.*, 389 U.S. 421 (1967); *Sincock v. Gately*, 262 F.Supp. 739, 831, 833 (D. Del. 1967); *Bush v. Martin*, 251 F.Supp. 484, 513 (S.D. Tex. 1966).

⁵ In addition to the cases cited above, *see also In re Pa. Congression. Dist. Reapportionment Cases*, 567 F.Supp. 1507, 1517 (M.D. Pa. 1982); *Dunn v. Oklahoma*, 343 F.Supp. 320, 327-28 (W.D. Okla. 1972); *Grivetti v. Illinois State Electoral Board*, 335 F.Supp. 779, 789, 791 (N.D. Ill. 1971), *aff'd mem.*, 406 U.S. 913 (1972); *Kilgarlin v. Martin*, 252 F.Supp. 404, 433-34 (S.D. Tex. 1966), *rev'd on other grounds sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967) (*per curiam*); *Grills v. Branigan*, 255 F.Supp. 155, 156 (S.D. Ind. 1966), *vacated and remanded on other grounds sub nom. Duddleston v. Grills*, 385 U.S. 455 (1967); *Meeks v. Avery*, 251 F.Supp. 245, 250-51 (D. Kan. 1966).

McKeithen, 407 U.S. 191, 194 (1972) (*per curiam*) (reapportionment issue not considered below); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 413-14 (1982) (constitutional claim not considered by lower courts). *See also Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290, 293 (1923) ("Generally it is not desirable that we should pass upon such matters until they have been dealt with below.")

Vacating and remanding here would not only allow the district court to address the justiciability question but would also permit the Court to resolve the case and invalidate the plan under Section 2 of the Voting Rights Act and thus avoid the constitutional questions altogether.⁶ *Escambia County, Florida, et al., v. Henry T. McMillan*, ____ U.S. ____, 104 S.Ct. 1577 (1984) (*per curiam*).

There are special reasons in reapportionment cases to seek the wisdom of lower courts. The geography and demographics of the various states differ dramatically in ways significant to claims of political gerrymandering.⁷ District court perspectives in their home states may be especially useful to this Court in deciding whether judicially manageable standards exist for assessing partisan gerrymandering claims. *See Storer v. Brown*, 415 U.S. 724, 742 (1973), remanding ballot access case for consideration "in the context of California politics."

⁶ The district court apparently assumed that discriminatory intent was a requirement in Section 2 cases. App.Jur.St. at A-20. It is not. *See* 42 U.S.C. §1973(b).

⁷ For example, in midwestern states with small and largely rural populations, laid out mostly along the meridians of the map, "compactness" and the aesthetic "shape" of districts may be of some use. In highly populated mountainous or coastal states, however, they are not.

II

JUDICIAL REVIEW OF POLITICAL GERRYMANDERING CLAIMS IS UNMANAGEABLE AND SHOULD NOT BE APPROVED SUMMARILY

It is not enough simply to assert that if racial gerrymandering is justiciable, political gerrymandering must be as well. Political gerrymandering claims raise extraordinarily difficult problems in defining the protected group, measuring adverse effect and proving discriminatory intent, problems that are not present—or at least are manageable—in racial gerrymandering cases.⁸

Reapportionment is inherently political. *Gaffney v. Cummings*, *supra*, 412 U.S. at 752-53. Every decision about the placement of district boundaries will almost certainly affect some political interests adversely.

The key concept to grasp is that there are no neutral lines for legislative districts. Whether the lines are drawn by a ninth-grade civics class, a board of ph.D's, or a computer, every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place.

Dixon, Robert G., Jr., "Fair Criteria and Procedures for Establishing Legislative Districts", in Grofman, et al. (ed.), *Representation and Redistricting Issues* at 7-8.

Even political scientists committed to altering the reapportionment process are forced to recognize the severe problems in establishing measures of political gerrymandering. Professor Backstrom's review of the political science complexities is enough to give any court pause:

⁸ In addition, the impact of a change in the law would be far-reaching. It would presumably affect not only congressional and legislative apportionment but also every type of districted local elective body—cities, counties and boards—to which the Equal Protection Clause has been held to apply. See *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 n.11 (1977); *Hadley v. Junior College District of Kansas City*, 397 U.S. 50 (1970); *Avery v. Midland County*, 390 U.S. 474 (1968).

What this chapter illustrates is the vast complexity in practice of trying to implement a fair districting plan, accommodating all possible representation goals. In any event, the desire of some reformers to try to sterilize the redistricting process from all partisan input and measures is a hopeless, if not misguided, effort. Just because the drafter of a redistricting plan is unconscious of partisan criteria does not mean that the resulting plan will be fair. There is simply no way of drawing a redistricting plan without effects, both representational and partisan political. Give a chimp in a zoo a crayon and a map, and the resulting plan will have differential effects on people.

Backstrom, Charles H., "Problems of Implementing Redistricting", in Grofman, et al., *supra* at 45-46.

Professor Robert Dixon, originally a strong advocate of developing "standards," came to question his earlier approach. Instead, he proposed establishing nonpartisan reapportionment commissions as perhaps the only way to achieve the political reform that he and his colleagues supported.⁹ See Dixon, "Fair Criteria and Procedures for Establishing Legislative Districts" in Grofman, et al., *supra*.

There is no way for courts to enter this arena without making "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr*, *supra*, 369 U.S. at 217. There is also no way for courts to identify manageable standards to guide judicial review.

A. Identifying the Members of a Protectable Political Group Is Impossible

Gerrymander cases are not one person, one vote cases. *Whitcomb v. Chavis*, *supra*, 403 U.S. at 142; *Nevett v. Sides*, 571 F.2d 209, 215 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980). One

⁹ In California, two such proposals for reapportionment commissions have been presented for popular vote in the form of Initiative Constitutional Amendments within the last three years. Each time the electorate rejected the proposal. See Proposition 14, November, 1982; Proposition 39, November, 1984.

person, one vote cases focus on the quantitative weight of an individual's vote¹⁰ and the voting interest protected is an individual right, not a group right. *Reynolds v. Sims*, 377 U.S. 533, 561, 580-81 (1964); *Mirrione v. Anderson*, 717 F.2d 743, 745 (2d Cir. 1983), *cert. denied*, _____ U.S. _____, 104 S.Ct. 1308 (1984).

Gerrymander claims, by contrast, focus on a group's power to assert political influence.¹¹ And, while "state sponsored segregation based on race, religion, or ancestry is peculiarly vulnerable to constitutional attack . . . [t]he integration of Democrats and Republicans, or of Liberals and Conservatives, has no such privileged status under the Federal Constitution." *WMCA, Inc. v. Lomenzo*, 238 F.Supp. 916, 926 (S.D.N.Y.), *aff'd*, 382 U.S. 4 (1965) (*per curiam*). See also *Whitcomb v. Chavis*, *supra*, 403 U.S. at 149.

There are unique historical reasons for the specially protected status of racial and ethnic groups whose ability to participate in the political process has been impeded. See *United States v.*

¹⁰ In congressional reapportionment, this requirement is imposed by Article I, § 2. See *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). In state legislative reapportionment, it is imposed by the Equal Protection Clause. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). However, the underlying principle in either case is that of equipopulous districts. See *id.* at 579. The term one person one vote is, therefore, a somewhat inaccurate shorthand. Equipopulous districts are based upon population figures, not the number of voters or even of those eligible to vote.

¹¹ *Whitcomb v. Chavis*, *supra*, 403 U.S. at 149-50; *Nevett v. Sides*, *supra*, 571 F.2d at 216; *Cousins v. City Council of City of Chicago*, *supra*, 466 F.2d at 851 (Stevens, J., dissenting); *Kilgarlin v. Martin*, *supra*, 252 F.Supp. at 432-33. See also *Mobile v. Bolden*, 446 U.S. 55, 78 (1980). Racial gerrymandering cases thus present issues of race discrimination which are judged by standards developed in other race discrimination cases that may not have involved voting rights at all. See *Rogers v. Lodge*, 458 U.S. 613, 617 (1982), citing *Washington v. Davis*, 426 U.S. 229, 240 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), the Court intervened because it was faced with something over and beyond the "familiar abuses of gerrymandering." It was faced with racial discrimination.

Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938); *White v. Regester*, 412 U.S. 755, 766-68 (1973). Additionally, while racial and ethnic groups entitled to protection in the reapportionment process can be easily defined, the same is not true of political groups.

Affiliation with a political party is by definition changeable. See *Kusper v. Pontikes*, 414 U.S. 51 (1973). "The only time voter registration figures are static is during the 30-day closure periods between primary and general elections." *Wymbs v. Republican State Exec. Committee of Florida*, 719 F.2d 1072, 1086, (11th Cir. 1983), *cert. denied*, _____ U.S. _____, 104 S.Ct. 1600 (1984).

Nor is it possible to define political groups by their voting activity. Individuals vote for individuals in this country and are notorious for disregarding party affiliation in order to do so. It is a commonly known and judicially noticeable fact that party loyalty in election activity varies tremendously from election to election in any given year and in different election years.

The difficulties in identifying "a politically salient class", *Karcher v. Daggett*, *supra*, 103 S.Ct. at 2672 (Stevens, J., concurring), become apparent when one examines the lower court's decision in this case. The district court purports to intervene to protect "those who align themselves with the Democratic Party." App.Jur.St. at A-26. However, in order to assess adverse impact, it relies on whether a vote was cast for a Republican or Democratic candidate, regardless of the voter's party affiliation. *Id.* at A-11 to A-12. The group entitled to protection under this approach would be without identifiable members except on election day in a particular month of a particular year. It certainly has no continuing identity to which this or any other court might extend constitutional protection. See *Whitcomb v. Chavis*, *supra*, 403 U.S. at 156-57; *Mobile v. Bolden*, *supra*, 446 U.S. at 78 n.26; *Jiminez v. Hidalgo Co. Water Improve. Dist. No. 2*, *supra*, 68 F.R.D. at 673-74.

B. There Are No Manageable Standards for Measuring Adverse Political Impact

The district court purported to measure the Indiana reapportionment plans against a series of standards such as competitiveness, compactness or unusual shapes, deviations from political boundaries, and preservation of communities of interest. *See, e.g., App.Jur.St. at A-14, A-27.* Additionally, although it disclaimed use of a proportionality standard, the court imposed exactly that.¹²

The court's failure to consider the usefulness of these criteria and whether they embody hidden policy judgments is reflected in its willingness to proceed on "suspicion of [a] kind of built-in bias" (*App.Jur.St. at A-13*) and to conclude that "a disparity speaks for itself." *Id. at A-20.* Before this Court acts on the merits, some systematic identification and evaluation of the criteria to be used to support findings of a political gerrymander is essential.

Even a brief review of just two of the standards relied upon by the district court—compactness (*App.Jur.St. at A-14, A-27*) and proportionality (*App.Jur.St. at A-11 to A-12, A-19, A-25*)—highlights the problems.¹³

¹² The majority compared the statewide percentage of votes cast for Democratic and Republican candidates with the percentage of legislative seats won by Democrats and Republicans, and concluded that a disproportionately low number of Democrats were elected. *App.Jur.St. at A-11 to A-12.* The dissent chose to compare the percentage of legislative seats won by a given party with average figures for votes cast for that party's candidates in elections for statewide offices. *Id. at A-44 to A-45.* Either approach focuses on the proportionality between the number of votes candidates from a given party receive and the number of seats that party wins, despite the district court's disclaimer. *Id. at A-25.*

¹³ Because the only issue now before the Court is whether this case should receive plenary consideration, we will not attempt to present here a comprehensive analysis of proposed standards.

1. Compactness is not a neutral or a manageable standard

The term "compactness" refers to the aesthetics of district shape. Despite its superficial allure, the compactness standard does not survive close scrutiny.¹⁴

Compactness is not politically neutral. It favors political groups that are geographically more evenly distributed throughout a state.¹⁵

In states where city or county boundaries are highly irregular, district lines that follow those boundaries will inevitably have "tortuous" shapes. *Gaffney v. Cummings, supra*, 412 U.S. at 752 n.18. *See also Legislature v. Reinecke*, 10 Cal.3d 396, 413 (1973) ("Some cities have exceedingly irregular boundaries with an odd assortment of 'fingers' and 'peninsulas' jutting out

¹⁴ This Court has previously held that compactness is not a constitutional requirement. *Gaffney v. Cummings, supra*, 412 U.S. at 752 n.18; *White v. Weiser*, 412 U.S. 783 (1973); *Wright v. Rockefeller*, 376 U.S. 52 (1964). Although compactness was once required by federal statute, *see Reapportionment Act of 1901*, 31 Stat. 734 (1901) and *Act of August 8, 1911*, 37 Stat. 14 (1911), this statutory requirement was abandoned decades ago. *Act of June 18, 1929*, 46 Stat. 26-27 (1929). The California Constitution, although it establishes some reapportionment guidelines beyond equipopulous districts, noticeably omits compactness. Cal. Const. Art. XXI.

¹⁵ Thus, if as is often the case, minority groups are highly concentrated in urban areas, application of a compactness standard would amount to a judicial imprimatur on gerrymanders disfavoring minorities and favoring groups that are characterized by more even geographical distribution. Crossing of county/city boundaries and violations of district compactness may be necessary to provide fair minority participation. *See Jordan v. Winter*, No. GC 82-80-WK-O (N.D. Miss., April 16, 1984), *aff'd sub nom. Brooks v. Allain in Mississippi Republican Executive Committee v. Brooks*, _____ U.S. _____, 105 S.Ct. 416 (1984) (sprawling uncompact districts in court-ordered interim plan adopted to assure fair racial representation). In either event, compactness will be directly at odds with efforts to enhance minority representation. *Cf. United Jewish Organization v. Carey*, 430 U.S. 144, 167-68 (1977).

from the basic part of the city.”).¹⁶ Moreover, as Professor Dixon has noted,

A district pattern of symmetrical squares, although conceivable, well can operate to submerge a significant element of the electorate. . . . [A] benign gerrymander, in the sense of some asymmetrical districts, may well be required to assure representation of submerged elements within a larger area. Shape requirements focus on form rather than the substance of effective political representation.

Dixon, “Fair Criteria and Procedures for Establishing Legislative Districts”, in Grofman, et al., *supra* at 16.

Adoption of a compactness standard would almost certainly lead legislatures to emphasize this criterion to the exclusion of other more substantive and important considerations affecting the quality of the vote—considerations like the interests of minority groups—in an effort to avoid litigation and judicial condemnation. Finally, the compactness standard is no guarantee against gerrymandering. “A committee (of any composition) may comply with all the rules of compactness, contiguity, and such, and still create a masterful gerrymander.” Papayanopoulos, Lee, “Compromise Districting”, in Grofman, et al., *supra* at 63. Compactness is a misleading and unmanageable standard for judicial assessment of partisan gerrymanders.

2. Proportionality is not a neutral or a manageable standard

This Court “has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation.” *Mobile v. Bolden*, *supra*, 446 U.S. at 79. See also *Whitcomb v. Chavis*, *supra*, 403 U.S. at 156-57, 160; *White v. Regester*, *supra*, 412 U.S. at 765-66; *Rogers v. Lodge*, *supra*, 458 U.S. at 618. Yet commentators, either directly or indirectly, continue to urge this as a constitutional standard. See, e.g.,

¹⁶ Compactness will also conflict with other communities of interest. A coastal community follows a narrow swath of land on a usually irregular coastline. A river’s meandering course often unites an agricultural community.

Lijphart, Arend, “Comparative Perspectives”, in Grofman, et al., *supra*, at 155 (quoting Dixon); Pennock, J., *Democratic Political Theory* (1979) at 358. And the court below applied what amounts to a proportionality standard. See n. 12, *supra*.

Proportionality requirements are utterly inconsistent with an electoral system like ours in which legislators represent districts and run in individual winner-take-all political races. See Dixon, Robert G., Jr., 1971, “The Court, The People and ‘One Man, One Vote’”, in Polsby, Nelson, W. (ed.), *Reapportionment in the 1970s* at 13; see also Baker, Gordon E., “Threading the Political thicket”, in Grofman, et al., *supra* at 31. See generally Note, “The Constitutional Imperative of Proportional Representation,” 94 Yale L.J. 163 (1984). As this Court said in *Whitcomb v. Chavis*:

[T]ypical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it, one candidate wins, the others lose. *Arguably the losing candidates’ supporters are without representation since the men they voted for have been defeated*; arguably they have been denied equal protection of the laws since they have no legislative voices of their own. This is true of both single-member and multi-member districts. *But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called “safe” districts where the same party wins year after year.*

Whitcomb v. Chavis, *supra*, 403 U.S. at 153 (emphasis added).

See also *Wells v. Rockefeller*, 311 F.Supp. 48, 51 (S.D. N.Y.), *aff’d mem.* 398 U.S. 901 (1970) (“Recent election figures . . . are only indicative of the voters’ reaction to a particular candidate.”).

The district court assumed that disproportionate election results are a signal of partisan gerrymandering. But in winner-take-all district elections, disproportionate results are the norm rather than the exception regardless of who draws the lines. See Dixon,

"The Court, The People, and 'One Man, One Vote' ", in Polsby, *supra*, at 13.

Moreover, as is clear from this case, a proportionality standard cannot reliably be applied until after an election has been held. Even then, a substantial element of speculation as to what will occur in the next election will always remain. As the court said in *Kilgarlin v. Martin*, *supra*, 252 F.Supp. at 433: "The only demonstrable way available to fathom the political inclinations of a certain area at any given time is at the ballot box on a given election day."

C. There Are No Manageable Standards for Evaluating Invidious Discriminatory Intent in Partisan Gerrymandering Cases

The constitutional requirement of equipopulous districts is straightforward: a plan either meets the numerical one person, one vote standard or it does not. By contrast, in the context of racial gerrymandering a "discriminatory purpose" must be proved to invalidate a plan and justify judicial intervention. *Rogers v. Lodge*, *supra*, 458 U.S. at 617, 620; *Mobile v. Bolden*, *supra*, 446 U.S. at 66-68; *Washington v. Davis*, 426 U.S. 229, 240 (1976); *Wright v. Rockefeller*, *supra*, 376 U.S. at 58. See also *White v. Regester*, *supra*, 412 U.S. at 765, and *Whitcomb v. Chavis*, *supra*, 403 U.S. at 142 (multi-member districts are not unconstitutional *per se* despite their known tendency to dilute the minority vote).

In racial gerrymander cases specific standards have been developed to guide the court's assessment of whether purposeful dilution of the vote on racial lines has been established. See *Rogers v. Lodge*, *supra*, 458 U.S. at 624-27; *White v. Regester*, *supra*, 412 U.S. at 765-69; *Whitcomb v. Chavis*, *supra*, 403 U.S. at 154-55; *Nevett v. Sides*, *supra*, 571 F.2d at 216-17; *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd on other ground sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976) (*per curiam*). But these standards for

assessing discriminatory purpose are utterly irrelevant in the partisan context.¹⁷

Any effort to develop a new set of standards for partisan cases will inevitably draw courts into the unmanageable and extremely sensitive realm of inquiring into legislators' subjective states of mind. For example, the lower court in this case apparently relied upon deposition testimony from the Speaker of the House regarding "reasons that were operative in [his] mind" in formulating districts. App.Jur.St. at A-8. See also *id.* at A-9, A-14 (Senator Bosma's view of considerations involved in drafting the plan). Yet this Court has frequently reiterated that statements from individual legislators are not appropriate bases for determining legislative intent. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383-85 (1968); *Hing v. Crowley*, 113 U.S. 703, 710-11 (1885).

Attempts to review state legislative procedures in enacting a reapportionment plan are also likely to place federal judges in the awkward position of resolving factual disputes about what really happened in the course of legislative considerations.¹⁸ Such fact

¹⁷ For example, neither Republicans nor Democrats nor members of any other political group have suffered anything approaching the sort of systematic economic, employment and educational discrimination that for decades has undermined the ability of racial minorities to participate in the election system. See *White v. Regester*, *supra*, 412 U.S. at 768-69. Nor can members of political parties point to poll tax laws, onerous voter registration requirements or other such devices designed and adopted specifically to exclude them from the election system. See *Rogers v. Lodge*, *supra*, 458 U.S. at 624. The three-judge court in this case purports to apply the "well-established standard of proof for invidious discrimination as set forth in *City of Mobile v. Bolden*." App.Jur.St. at A-21. However, the subjective evidence of individual legislators' views on which the three-judge court relied is quite different from the factors discussed in *Mobile v. Bolden* or in this Court's subsequent clarifying decision in *Rogers v. Lodge*, *supra*.

¹⁸ In this case, for example, the court found it significant that Democrats were not involved as voting members on the conference committee that reviewed the plan. App.Jur.St. at A-7. The court apparently disregarded evidence that the Senate Democratic leadership

finding injects federal courts into the very heart of state government. The absence of other criteria for assessing discriminatory intent is one more reason why claims of partisan gerrymandering are and should remain non-justiciable.

CONCLUSION

This Court should note probable jurisdiction. The Judgment should then be vacated and the matter remanded for further consideration by the three-judge court. Alternatively, the case should be set for plenary consideration.

Dated: March 1, 1985

Respectfully submitted,

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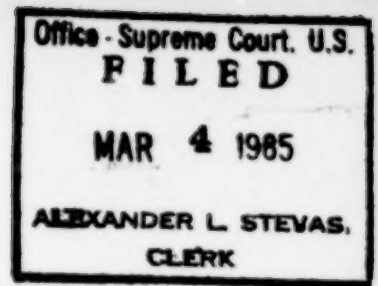
Assembly of the

State of California

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had informed the Republican leadership that no Democrat would vote for a reapportionment plan prepared by the Republicans in any event. See Jurisdictional Statement at p. 4.

No. 84-1244



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**AMICUS CURIAE BRIEF OF THE MEMBERS OF
THE
CALIFORNIA DEMOCRATIC CONGRESSIONAL
DELEGATION**

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QUESTION PRESENTED

Did the court below violate the principles of *Ashwander V. Tennessee Valley Authority*, 297 U.S. 288 (1936) and *Railroad Commission of Texas V. Pullman Co.*, 312 U.S. 496 (1941) in inadequately evaluating federal statutory issues and ignoring state constitutional issues that could have obviated the need to reach out to create a new purported federal constitutional claim for "partisan gerrymandering" that is in conflict with controlling decisions of the circuit of the court below and with the teachings of this Court?

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CONGRESSIONAL DELEGATION

SUMMARY OF ARGUMENT

As this Court observed in *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944):

If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.

See also *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) and cases cited, *infra*, in Section I.

In this case, the district court was faced with alleged violations of the Indiana Constitution, the Voting Rights Act and the novel federal constitutional claim that complaints of partisan gerrymandering are within the purview

of the Equal Protection Clause. The district court stood the principle of *Ashwander* and *Spector Motor Service* on its head, and reached out, over a federal statute and a state constitution, to make new and erroneous constitutional law. The court's error was three-fold.

First, the court gave only casual attention to the Voting Rights Act claim and failed to evaluate the districts in terms of the recognized statutory criteria. Then, despite finding that the challenged multi-member districts had "hard and harsh" disadvantaging effects on black voters, the court analyzed this disturbing finding only in terms of its partisan gerrymandering theory, dismissing the Voting Rights Act claim on the basis of an intent test abandoned by the 1982 amendments to the Act. The court's offhand treatment of this statutory claim has deprived this Court of an adequate basis for review.

Second, the court utterly failed to consider the plaintiffs' claims that the Indiana legislative districts violated the state's own constitution. While this Court has refused to place the burden of resolving partisan disputes about the fairness of redistricting plans on the shoulders of the federal courts, it has noted and approved efforts by the states to tame partisan zeal within their boundaries. Because of the sensitive state policies at play in the redistricting process and the nascent state of Indiana law in the area, the district court should have carefully considered whether the abstention doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1944), counseled it to permit the Indiana courts the opportunity to pass on the state issues, which could have obviated the perceived need to make new constitutional law. Even if abstention had not been strongly indicated, the district court clearly was obliged to consider carefully the state constitutional claims. It nowhere did so.

Third, once it had forced the partisan gerrymandering issue upon itself, the court failed to evaluate the threshold

justiciability issue, ignoring controlling authority and fundamentally misconstruing the import of *Karcher v. Daggett*, 462 U.S. 725 (1983).

Accordingly, this Court should summarily vacate the judgment and order below, and remand this case for further consideration in light of these principles.

ARGUMENT

I

THE DISTRICT COURT FAILED PROPERLY TO CONSIDER THE PLAINTIFFS' VOTING RIGHTS CLAIM.

The plaintiffs below alleged violations of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (as amended), as well as violations of the Fourteenth and Fifteenth Amendments. In its zeal to reach out to make new constitutional law, the district court devoted only the most perfunctory analysis to this statutory claim before dismissing it. *See* Juris. Stmt. Appx. A-18-20. The dismissal was wholly grounded on the court's conclusion that while the challenged plans indeed had harsh disadvantaging effects on black voters, the drafters of the plan intended to disadvantage these voters because of "their politics and not because of their race." *Id.* at A-20. Dismissal of the Voting Rights Act claims on this basis fundamentally misapprehended the Act. The judgment should be vacated and the case remanded for proper factual and legal consideration of the plaintiffs' statutory claims, which could obviate the need for this Court to decide the case on constitutional grounds.

The court's factual findings on the race discrimination claims are incomplete at best. Nonetheless, they certainly

suggest that the court found that the challenged redistricting plans had significant discriminatory effects. The findings include the following:

1. "The disadvantaging effect of the plan's multi-member districts falls particularly hard and harsh upon black voters in the state." Juris. Stmt. Appx. at A-18.

2. "Among blacks, 81.2 percent of the population resides in multi-member districts. An estimated 65 percent of the white population, by comparison, resides in single member districts. In addition, other evidence indicates that only 43 percent of the blacks living in multi-member districts live in so-called minority/majority districts, *i.e.*, they reside in the district where blacks comprise a majority of the voters." *Id.*

3. "The multi-member district approach is particularly effective in 'stacking' blacks into large majority districts and fragmenting their population among other districts." *Id.* at A-19.

4. The Indiana plan "had a significantly adverse impact upon black voters." *Id.* at A-20.

5. "The majority party through the use of multi-member districts stacked or split concentrations of black democratic voters so that their elective power would be minimized." *Id.* at A-30.

Despite these disturbing findings, the majority summarily rejected the NAACP plaintiffs' claims, apparently on the theory that the "harsh" and "significantly adverse" effect on black voters was not directed against blacks *qua* blacks, but rather against blacks as voters "likely" to vote for Democratic candidates.

This analysis of the defendants' animus is, of course, irrelevant to the proper disposition of the plaintiffs' Voting Rights Act claims. It is well recognized that the 1982 amendments to Section 2 of the Voting Rights Act, relieved

plaintiffs of the often insurmountable task of proving discriminatory intent. *See* Pub. L. No. 97-205, § 3, codified at 42 U.S.C. § 1973(b) (1982). A Section 2 claim can be established by showing that the challenged "structure or practice *results* in a dilution of minority voting power." *Major v. Treen*, 574 F. Supp. 325, 350 (E.D. La. 1983) (emphasis in original). Determination of such dilution is to be determined under "the totality of circumstances." 42 U.S.C. § 1973(b) (1982).

From the desultory factual findings of the district court, it is impossible to determine whether a Voting Rights Act violation did or did not occur.¹ It is, however, quite clear that the district court erred when its haste to reach the partisan gerrymandering claim led it to dismiss the Voting Rights Act claim on the basis of its conclusions about the defendants' motivations. It is equally clear that a fundamental tenet of federal jurisprudence is that a federal court should never ignore a valid statutory claim in preference to a decision on a federal constitution ground; rather, in order to preserve and properly delimit the power of federal judiciary, the court should decide cases on statutory rather than constitutional grounds. *See City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (lower court failed to address Voting Rights Act claim) (plurality); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 (1979); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69 (1947); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Ashwander v. Tennessee Valley*

¹ As the dissent correctly pointed out, the Senate Judiciary Committee report that accompanied the 1982 amendments set forth seven factors that courts should consider in evaluating a Section 2 claim. The opinion of the court declined to examine these factors.

Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).² As the court wrote in the *New York Transit* case:

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." [citation] Before deciding the constitutional question, it was incumbent on those courts [the district court and court of appeals] to consider whether the statutory grounds might not be dispositive.

New York Transit Authority v. Beazer, *supra*, 440 U.S. at 583 (footnote omitted).

This Court recently affirmed these principles in *Escambia County, Florida v. McMillan*, — U.S. —, 104 S. Ct. 1577 (1984). In that case, black voters challenged the at-large system for electing Escambia County commissioners under the First, Thirteenth, Fourteenth and Fifteenth Amendments, the Civil Rights Act of 1957, and the Voting Rights Act. The district court found that the at-large system intentionally disadvantaged black voters and that the scheme violated the Fourteenth and Fifteenth Amendments and the Voting Rights Act. The court mandated single member districts. The court of appeals affirmed this judgment and order, but did so solely on Fourteenth Amendment grounds. The court concluded that the finding of the Fourteenth Amendment violation obviated the need to review the lower court findings under the Fifteenth Amendment or under the Voting Rights Act. 104 S. Ct. at 1577-78.

This Court declined to review the question apparently presented by the appeal. Noting the lower court's failure

² In *Rescue Army v. Municipal Court*, *supra*, 331 U.S. at 568, this Court identified *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) as the decisional forbear of this rule, whose rationale the Court found in the Article III of the Constitution.

properly to consider the Voting Rights Act claim, the Court stated:

Affirmance on the statutory ground would moot the constitutional issues presented by the case. It is a well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S. Ct. 466, 483, 80 L. Ed. 688 (1936) (Justice Brandeis concurring).

104 S. Ct. at 1578-79. Accordingly, the Court vacated the judgment and remanded the case for consideration under the Voting Rights Act.

In this case, the district court "never explained [its] haste to address a naked constitutional issue despite the presence in the case of alternative statutory issues." *New York Transit Authority*, *supra*, 440 U.S. at 583 n.23. As in *Escambia County*, this case presented a Voting Rights Act claim that could have invalidated the redistricting plan at issue and thereby obviated the need to reach any novel constitutional issues. Unfortunately, the district court's enthusiasm to make new constitutional law has deprived this Court of adequate findings on which to conduct review of the statutory claim. Accordingly, the Court should summarily vacate the judgment below and remand the case for proper consideration of the plaintiffs' Voting Rights Act claims.

II

THE COURT BELOW ERRED IN FAILING TO ADDRESS THE PLAINTIFFS' CLAIMS OF PARTISAN VOTE DILUTION UNDER THE INDIANA CONSTITUTION AND IN FAILING PROPERLY TO CONSIDER THE *PULLMAN* ABSTENTION DOCTRINE IN CONNECTION WITH THOSE CLAIMS.

While the federal courts have been steadfast in their refusal to consider claims of "partisan gerrymandering" under the federal constitution,³ the courts have in no way impugned attempts on the state level to restrain partisan zeal. See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 103 S. Ct. 2653, 2660 n.6 and 2663 (1983) (noting and approving state requirements that districts be compact, respect local governmental boundaries, preserve cores of prior districts and avoid contests between incumbents; interpreting these as "steps to inhibit gerrymandering"). For instance, while the federal constitution does not require "compactness", *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973), many states have enacted it and similar limits on the redistricting process.⁴ Other states have constitutional provisions that permit dissatisfied voters, via popular referenda and initiatives, to strike down laws, including redistricting laws, of which they do not approve or to enact

³ See Section III, *infra*, for a brief discussion of the relevant authorities.

⁴ Almost half of the states require that districts be compact. See *Congressional Research Service, State Constitutional and Statutory Provisions Concerning Congressional and State Legislative Redistricting* (June 1981). According to the same report, twenty-nine states require contiguity. Redistricting statutes have run afoul of state compactness requirements. E.g., *Acker v. Love*, 178 Colo. 175, 178, 496 P.2d 75, 76 (1972); *In Re Legislative Districting of General Assembly*, 193 N.W.2d 784, 791 (Iowa 1972); *Preisler v. Doherty*, 365 Mo. 460, 284 S.W.2d 427 (1955).

provisions more to their liking.⁵ Several states have gone so far as to take the redistricting task away from their legislatures and place it in the hands of what are hoped to be "neutral" commissions.⁶ Finally, recognizing the basic intractability of providing "fair" representation to all cognizable political groups in the context of single-member, geographically based districts, some states and local governments have adopted proportional representation systems like those used in some European democracies.⁷ Thus, the states are a fertile area for experimentation with

⁵ See generally D. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 26 U.C.L.A. L. Rev. 505, 509 n.7 (1982) (listing states which allow popular initiatives). The California example is perhaps best known. In 1981, President Reagan, the California Republican Party and the Republican National Committee took their political objections to the voters and led a successful referendum campaign against the state's new congressional districts. See *Assembly v. Deukmejian*, 30 Cal. 3d 638, cert. denied and app. dismissed sub nom. *Republican National Committee v. Burton*, 456 U.S. 941 (1982). When a new statute was enacted in 1982, the Republicans eschewed this political remedy, preferring to take their renewed objections to the federal courts in a suit charging the judiciary with the task of evaluating the Republicans' charge of unfairness. See *Badham v. United States District Court for the Northern District of California*, 721 F.2d 1170 (9th Cir. 1983).

⁶ According to an October, 1982 report by the National Conference of State Legislatures, eight states used commissions to design representative districts for the 1980's: Arkansas, Colorado, Hawaii, Missouri, Montana, New Jersey, Ohio and Pennsylvania. In California, State Assemblyman Don Sebastiani has recently announced plans for a state constitutional initiative that would replace the state's current districts with ones drawn by a "neutral" political consultant.

⁷ See A. Lijphart, *Comparative Perspectives on Fair Representation, the Plurality Majority Rule, Geographical Districting, and Alternative Electoral Arrangements*, 9 Pol'y Stud. J. 899, 913-14 (1981) ("Approximately 25 American cities have experimented with [proportional representation systems] and Illinois used the cumulative vote . . . for the election of its lower house from 1870 to 1980."); see generally Note, *The Constitutional Imperative of Proportional Representation*, 94 Yale L.J. 163, 186 n.103 (1984).

responses to the often-invoked claim of partisan gerrymandering.

In this case, the plaintiffs asserted, in addition to their novel federal constitutional theory, two state constitutional grounds which they believed would invalidate the redistricting statute that they believed to threaten their political aspirations. Specifically, the plaintiffs alleged that the Indiana redistricting plans violated article II, § 1, and article IV, § 6 of the Indiana Constitution. Juris. Stmt. Appx. at A-51, 52. Article II, § 1 provides that "[a]ll elections shall be free and equal." This phrase has been interpreted by the Indiana Supreme Court to require that "the vote of every elector [be] equal in its influence upon the result to the vote of every other elector." *Blue v. State ex rel. Brown*, 206 Ind. 98, 114, 188 N.E. 583, 589 (1934), *overruled on other grounds*, *Harrell v. Sullivan*, 220 Ind. 108, 40 N.E.2d 115 (1942). Article IV, § 6 provides that "[a] senatorial or Representative District, where more than one county shall constitute a district, shall be composed of contiguous counties; and no county, for Senatorial apportionment, shall ever be divided." So far as *amici* are aware, the Indiana courts have not had an opportunity to construe either of these constitutional provisions in the context of the claim of partisan gerrymandering. In such circumstances, the district court should have given careful attention to the abstention doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498 (1941).⁸

An exhaustive discussion of the *Pullman* abstention doctrine is obviously beyond the scope of this amicus brief. Simply stated, the doctrine counsels abstention where the presence of an unclear issue of state law could obviate the

⁸ A brief review of the record below indicates that defendants in fact made a motion under *Pullman*. The motion appears to have been ignored or summarily denied; no memorandum order discussing the issue appears in the record.

need to reach a federal constitutional issue that touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative is open. See *Railroad Commission of Texas v. Pullman Co.*, *supra*, 312 U.S. at 498. Reapportionment, of course, is a peculiarly sensitive area of state social policy. E.g., *White v. Weiser*, 412 U.S. 783, 794-95 (1973); *Badham v. United States District Court for the Northern District of California*, 721 F.2d 1170, 1172, 1176 (1983). Moreover, the Indiana constitutional issues that plaintiffs raised are certainly unclear or susceptible of doubt — the Indiana courts have never addressed a political party's claim of invidious partisan discrimination under the State's constitution nor have they addressed the requirement to avoid unnecessarily splitting county units in this context. Plaintiffs undoubtedly asserted their Indiana constitutional grounds in good faith, correctly believing that, if established, they would void the redistricting plan their political party opposes. In similar circumstances, a recent Ninth Circuit panel, in an opinion by Judge Wallace, unanimously affirmed a unanimous abstention order rendered by a three-judge District Court. *Badham v. United States District Court*, *supra*.⁹ Indeed, one of the three independent state grounds that supported abstention in the *Badham* case was a claim that the challenged redistricting plan split an excessive number of city and county units in alleged violation of article XXI of the California Constitution. *Badham*, *supra*, 721 F.2d at 1179. The plaintiffs' Indiana constitutional claim mirrors this claim. In the face of an unprecedented federal constitutional theory about partisan gerrymandering, the assertion of a

⁹ As the Court is aware, a petition for a writ of certiorari has been filed in this Court challenging the *Badham* abstention order. *Badham v. Eu*, No. 84-1226.

state constitutional ground purportedly aimed at restraining exactly such partisan excesses provides a particularly compelling basis for invocation of the *Pullman* doctrine. At a minimum, the *Ashwander* doctrine obligated the district court at least to consider the state claims before reaching out to make new constitutional law.

The court below, propelled by zeal to decide a novel federal constitutional claim, failed to give adequate consideration to the teachings of *Pullman* and the distinct possibility that a decision under the Indiana Constitution could obviate the need or desire to pioneer new federal constitutional law. The judgment should be vacated and the case remanded for consideration in light of these principles.¹⁰

¹⁰ Of course, abstention is not to be undertaken lightly in a case claimed to involve the right to vote, e.g., *Badham, supra*, particularly in view of the fact that some such cases may be attended by exigency imposed by impending election deadlines. In this case, however, the district court's own order was to have no effect whatsoever on any impending election. Instead, the first elections that would be affected by the court's December 13, 1984 order are the 1986 elections, which were almost two years away — plainly an adequate time period in which to provide the Indiana courts an opportunity to decide the issue.

III

THE DISTRICT COURT'S RUSH INTO THE POLITICAL THICKET IGNORED CONTROLLING PRECEDENT AND FUNDAMENTALLY MISCONSTRUED *KARCHER V. DAGGETT*

Some commentators have suggested that in *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Wesberry v. Sanders*, 376 U.S. 1 (1964), the United States Supreme Court ventured into an impenetrable political thicket that would resist any attempt at judicial management.¹¹ They are wrong. The basic principle established in those cases is that state legislators and congressional representatives are to be elected from districts containing an equal number of individuals. This principle of equipopulous districts is readily managed by a judiciary equipped for rudimentary arithmetic. A quite different enterprise, however, was urged below in this case. The Democrats complained that they were entitled, as a group,¹² to be distributed over Indiana legislative districts in a manner that was likely to elect more representatives of their political affiliation. The claim is one for

¹¹ See, e.g., Auerbach, *The Reapportionment Cases: One Person, One Vote — One Vote, One Value*, 1964 Sup. Ct. Rev. 1 (1964); Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 Mich. L. Rev. 107 (1962); Sindler, *Baker v. Carr: How to "Sear the Conscience" of Legislators*, 72 Yale L.J. 23 (1962).

¹² See Note, *The Constitutional Imperative of Proportional Representation*, 94 Yale L.J. 163 (1984), for a discussion of this distinction. The note concludes that efforts to insure equally effective group representation for the myriad political groups that comprise our society requires that the United States adopt a system of proportional representation like that employed in some European democracies. Academic commentators have increasingly concluded that equally effective group representation requires such a system of proportional representation. See, e.g., A. Lijphart, "Comparative Perspectives" in *Representation and Redistricting* at 155 (quoting Professor Dixon); J. Pennock, *Democratic Political Theory* 358 (1979).

equally effective group representation, and lies at the very heart of the political thicket.

Judicial forays into this thicket have been exceedingly rare, and have so far been undertaken only on behalf of racial groups whose history of oppression strongly counsels special judicial vigilance. Even there, however, courts have acted only in the most extraordinary cases, when a dominant white government has effectively blocked black citizens from participation in the political process. These rare forays have produced some of the most anguished and divided opinions the Supreme Court has written, reflecting the intractability of the political issues involved.¹³ Indeed, Justice Stevens has stated that unless the Court abandons its present Equal Protection analysis in favor of one now supported only by himself, such cases invite the Court into "a vast wonderland of judicial review of political activity." *Rogers v. Lodge*, 458 U.S. 613, 649 (1982) (Stevens, J., dissenting).

The district court, however, paid little attention to this Court's or any court's cautions about the political thicket. To justify its headlong rush to the heart of the thicket, it engaged in a fundamental misreading of *Karcher v. Daggett*, 462 U.S. 725 (1983), and failed utterly to consider the subsequent history of that case, including this court's disposition of a stay petition from the district court's order on remand. *Karcher v. Daggett*, ___ U.S. ___, 104 S. Ct. 1691, 1696-97 (1984).

A. The Courts Have Uniformly Refused to Adjudicate Partisan Gerrymandering Disputes.

The judicial authority against the justiciability of political gerrymandering is overwhelming. It includes a United States Supreme Court decision and a Seventh Circuit opinion that were controlling on the district court. The district

¹³ See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

court ignored these cases, however, believing that a judicial revolution had occurred in *Karcher v. Daggett*, *supra*. *Karcher* reflects no such reapportionment revolution.

The Supreme Court precedent that should have bound the district court is *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965). In that case, the district court upheld a redistricting plan for the New York state legislature against several federal constitutional claims, including one based on alleged partisan gerrymandering. This court summarily affirmed. Justice Harlan concurred in the affirmance and explained its significance:

The three-judge court . . . rejected contentions that apportioning on a basis of citizen population violates the Federal Constitution, and that partisan "gerrymandering" may be subject to federal constitutional attack under the Fourteenth Amendment. In affirming this decision, this Court necessarily affirms these two eminently correct principles.

382 U.S. at 5-6 (emphasis omitted). Such a summary affirmance is binding on another three-judge court. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

The controlling force of *WMCA* has been recognized by numerous lower courts, which have followed it in holding claims of partisan gerrymandering nonjusticiable. E.g., *Cousins v. City Council of the City of Chicago*, 466 F.2d 830, 844 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972); *Ferrell v. State of Oklahoma*, 339 F. Supp. 73, 82 (W.D. Okla.), *aff'd*, 406 U.S. 939 (1972); *Meeks v. Avery*, 251 F. Supp. 245, 250-51 (D. Kan. 1966). Indeed, the lower courts have augmented the authority of *WMCA* by analyzing the justiciability problem for themselves. In the course of these analyses, they have identified the critical problem: the lack of judicially manageable standards.

In *Wendler v. Stone*, 350 F. Supp. 383 (S.D. Fla. 1972), the court dismissed a complaint which alleged partisan gerrymandering, holding the claim nonjusticiable. The "critical criterion," the court said, was the lack of standards. First, voting statistics from past elections were "grossly unreliable when used for prognostication."¹⁴ Second, if the court were to redraw district lines in the plaintiffs' favor, it would be subject to "charges of judicial political gerrymandering." A plan that favors one interest group "would, however, exclude or divide certain other interest groups."¹⁵ Third, the Constitution does not provide any guaranty of proportional group representation:

¹⁴ The district court acknowledged this fact, Juris. Stmt. Appx. at A-13, but then proceeded to base its analysis, in part, on assumptions about the identity of persons who would "align themselves with the Democratic Party" in future elections. *Id.* at A-26. These assumptions, of course, are based on voting statistics from past elections.

¹⁵ The most intractable political problem the courts would have would be to determine which groups are "identifiable" or "salient" enough to merit protection. As the plurality opinion in *Mobile v. Bolden* wondered:

Can only members of a minority of the voting population in a particular municipality be members of a "political group"? How large must a "group" be to be a "political group"? Can any "group" call itself a "political group"? If not, who is to say which "groups" are "political groups"? Can a qualified voter belong to more than one "political group"? Can there be more than one "political group" among white voters (e.g., Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one "political group" among nonwhite voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the size of its governing body? Upon its form of government? Upon its history? Its geographic location?

City of Mobile v. Bolden, *supra*, at 79 n.26. Even worse, of course, are the problems that would inevitably confront the Court in evaluating claims from groups whose desire for "fair" representation conflicted with the claims of other groups. See *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) ("affirmative" gerrymandering for black voters alleged to have fractured Hasidic Jewish community's vote).

[W]here the only alleged Constitutional defect is an envisioned weakening of an interest group's political strength, rather than any alleged deprivation of an individual's right to vote, no equal protection claim can be sustained.¹⁶

The court acknowledged that there is a "very limited right to representation" in cases where the alleged vote dilution was based on race or country of origin, but it attributed this right to the "special thrust" of the Civil War Amendments and the "specific concern of the Fifteenth Amendment for the voting rights of black citizens." 350 F. Supp. at 840-41.

Other courts agree with *Wendler* that past voting statistics are unreliable.

Recent election figures . . . are only indicative of the voters' reaction to a particular candidate. . . Plaintiff's approach of a fixed Republican-Democrat society ignores the all-important factors, amongst others, of the candidate's personality, the public's conception of his ability and integrity and current issues which he may espouse, or offer to espouse, on behalf of his constituents.

Wells v. Rockefeller, 311 F. Supp. 48, 51-52 (S.D.N.Y.) (rejecting partisan gerrymandering challenge to congressional reapportionment), *aff'd*, 398 U.S. 901 (1970); *accord*, *Kilgarlin v. Martin*, 252 F. Supp. 404, 433 (S.D. Tex. 1966) ("only demonstrable way available to fathom the political inclinations of a certain area at any given time is

¹⁶ Suggestions for judicial resolution of partisan gerrymandering claims are all ultimately grounded on proportional representation. Any concept of "vote dilution," in order to be intelligible, must posit an ideal state from which dilution can be alleged to have occurred. Careful analysis reveals that this implicit ideal state is assumed to be one of proportional representation. Justice Stevens and Justice Powell would not make all gerrymanders unconstitutional; instead, judicial intervention would be permitted only in sufficiently "egregious" cases, presumably ones in which the plaintiff political group's share of seats differed too greatly from its statewide share of votes.

at the ballot box on a given election day”), *aff’d in part and rev’d in part on other grounds sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967).

The courts also agree that the least representative branch has no neutral basis on which to redraw district lines, and that the only remedy open to it is to engage in a “remedial gerrymander”:

It would seem impossible for a court to pass upon the validity of political interests without itself making a political judgment or appearing to do so . . . [I]t rests with voters, rather than the Court, to review the soundness of the partisan decisions which may inhere in the lines the legislature drew.

Ferrell v. State of Oklahoma, *supra*, 339 F. Supp. at 84 (quoting *Jones v. Falcey*, 48 N.J. 25, 33 (1966)); *accord*, *In Re Pennsylvania Congressional Districts Reapportionment Cases*, 567 F. Supp. 1507, 1517 (M.D. Pa. 1982) (“[t]he remedy lies in the ballot box, not in a federal courthouse”); *Wells v. Rockefeller*, *supra*, 311 F. Supp. at 51.¹⁷

Finally, the courts have been especially wary of claims that explicitly or implicitly invoke any right to proportional representation. *See City of Mobile v. Bolden*, *supra*, 446 U.S. 55, 79 (1980) (“the Court has sternly set its face against the claim, however phrased, that the constitution somehow guarantees proportional representation”) (plurality); *Kilgarlin v. Martin*, *supra*, 252 F. Supp. at 432-33.

In sum, no court until the *Bandemer* court had ever held political gerrymandering to be justiciable. As one district court observed:

The summons to us . . . to pursue the gerrymander into the depths of the political thicket is one which has been

¹⁷ See notes 3 through 7 and accompanying text, *supra*, for a discussion of political and state judicial remedies for claimed partisan excesses.

often ignored or declined by the Supreme Court: the trumpet has not given even an uncertain sound, it has lain all but mute.

Jimenez v. Hidalgo County Water Improvement District No. 2, 68 F.R.D. 668, 673 (S.D. Tex. 1978) (footnotes omitted), *aff’d*, 424 U.S. 950 (1976). The district court in the *Bandemer* case incorrectly concluded, however, that this Court had sounded the trumpet in *Karcher*.

B. The Opinions in *Karcher* in No Way Constitute a Precedent Making Claims of Partisan Gerrymandering Justiciable.

Karcher was not a case about gerrymandering; rather, it was a case about population equality. It was not tried on a gerrymandering theory, 103 S. Ct. at 2677 (Justice Stevens, concurring); the district court did not address gerrymandering, *id.* at 2690 (Justice Powell, dissenting); and the jurisdictional statement in this Court did not treat the gerrymandering issue. Justice Stevens and Justice Powell, however, did express, in dicta, their views that sufficiently egregious instances of partisan gerrymandering should be found to constitute a violation of the Equal Protection Clause. The district court, however, erroneously concluded that Justice White’s dissenting statements disapproving of partisan gerrymandering evidenced a “willingness to analyse such claims under the Equal Protection Clause,” *Juris. Stmt. Appx.* at A-43, and that the three justices who joined in his opinion concurred in that view. In so doing, the district court failed to acknowledge the subsequent history of the *Karcher* case.

As this Court well knows, on consideration of an application to stay the district court’s order on remand, Justice Brennan, dissenting from a denial of the stay, stated unequivocally: “We have never concluded, nor in my view should we conclude, that the existence of noncompact or

gerrymandered districts is by itself a constitutional violation." *Karcher v. Daggett*, 104 S. Ct. 1691, 1696-97 (1984). His opinion was joined by Justice Marshall and, significantly, by Justice White, on whose opinion the *Bandemer* court relied. Thus, of the Justices who commented on the partisan gerrymandering issue in *Karcher*, three reaffirmed this Court's historical unwillingness to entertain such claims, while only two opined that the rule should be changed. The district court's failure to take cognizance of the stay opinion, a matter of record months before it rendered its opinion, only underlines the court's precipitous approach to the justiciability issue in this case.

IV CONCLUSION

For all the foregoing reasons, this Court should summarily vacate the judgment below and remand the case for consideration under the Voting Rights Act and the *Pullman* abstention doctrine.

Dated: March 4, 1985.

Respectfully submitted,

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No. 84-1244

Office - Supreme Court, U.S.

FILED

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,

Appellants,

vs.

IRWIN C. BANDEMER, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF INDIANA

JOINT APPENDIX

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APPEAL DOCKETED JANUARY 31, 1985.
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Relevant Docket Entries Below

- 1/20/82 Court files entry naming panel as designated by the Chief Judge of the Seventh Circuit Court of Appeals, providing that Judge Wilbur Pell shall be presiding Judge and Judge Gene E. Brooks shall be the third member of the panel. Court sets briefing schedule. (S.E.)
- 4/8/82 Plaintiffs file: (1) Notice of amendment to complaint, c/s; (2) Amended complaint, c/s.
- 5/3/82 Court enters order Denying the defendant's motions to dismiss. Court orders that these cases are now consolidated for all further proceedings including trial. All discovery shall be completed by July 30, 1982. Court files memorandum entry. (S.E.).
- 11/9/82 Upon the motion of defendants filed May 12, 1982; said motion requesting the Court to dismiss or in the alternative to abstain the Court now enters order denying said motion. (S.O.) Parties are hereupon requesting to notify this Court as to the status of these proceedings, what further matters must be concluded to expedite trial and a recommendation as to appropriate trial date for this cause.
- 10/12/83 Three Judge Panel Court Trial. 10:05 A.M. Parties appear Theodore Boehm, Christopher Scanlon and John Swarbrick appear on behalf of plaintiff Bandemer. Michael Sussman and Dennis Hayes Appear on behalf of the N.A.A.C.P. Plaintiffs. William M. Evans and Michael Schaefer appear on behalf of defendants. Pre-trial held. Opening statements heard. 10:35 A.M. Court convenes. 4:00 P.M. Plaintiff Bandemer Rests. 4:00 P.M. Plaintiff NAACP Evidence commences. 5:00 P.M. Court recessed until November 16, 1983.

11/16/83 9:45 A.M. Parties appear and Court convenes. Plaintiff NAACP evidence continues. 2:45 P.M. Plaintiff NAACP Rests. 3:00 P.M. Defendant's evidence commences. 6:45 P.M. Defendants Rest. Court Orders plaintiffs to submit first briefs within 20 days. Defendants are to submit answer briefs within 15 days after plaintiff's briefs are submitted. And Rebuttal briefs are to be filed within 10 days from date of defendants briefs. Court orders all briefs to be no more than 35 pages in length. Court to hear oral argument after all briefs are submitted at a future date to be determined by the Court. 7:00 P.M. Court recessed.

1/23/84 Court enters entry and NOW ANNOUNCES that while the opinion of this Court will be entered as soon as practicable the effective date of the decision will be subsequent to the conduct of the 1984 election at which members of the Senate and House of the General Assembly of Indiana will be elected. IT IS SO ORDERED.

1/23/84 9:45 A.M. Parties appear court is convened. Theodore Boehm begins final argument for plaintiff Bandemer. 10:00 A.M. Michael Sussman's final argument for plaintiff, N.A.A.C.P. 10:25 A.M. William Evans begins final argument for defendants. 10:50 A.M. Theodore Boehm presents rebuttal for plaintiff, Bandemer. 11:00 A.M. Michael Sussman presents rebuttal for plaintiff, N.A.A.C.P. 11:05 A.M. Court announces it will take matter under advisement. 11:05 A.M. Court is adjourned. Court enters Entry (See Jan. 23, 1984 Entry).

12/13/84 Court enters ORDER AND

1. DECLARES and DECREES that the 1981 Indiana House and Senate legislative

reapportionment acts and the 1982 amendments thereto are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

2. ORDERS that this decision has prospective application only and this Court hereby recognizes that the November 6, 1984 election was legally held and, further, that the 1985 session of the General Assembly and its members are duly constituted under the law.

3. ORDERS that the state officers responsible for implementing the election laws and holding elections thereunder are hereby ENJOINED from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto subsequent to the November 6, 1984 general elections.

4. ORDERS that the 1985 session of the Indiana General Assembly is hereby afforded the opportunity to enact legislation to redistrict the State and reapportion the legislative seats in the General Assembly in accordance with federal constitutional requirements and in compliance with this opinion.

5. ORDERS that this court shall have and retain continuing jurisdiction over the present cases and should the 1985 General Assembly not enact a reapportionment law which is in compliance with federal constitutional requirements and the Orders of this Court, then this Court shall further act as it is deemed necessary and appropriate under the circumstances then presented to the Court. Case Closed ... cm (E.O.D. 12/13/84)

12/18/84 Motion to modify or amend filed by defendants, c/s.

JA-4

- 12/21/84 Bandemer Plaintiffs' response to defendants' motion to modify or amend filed, c/s.
- 12/27/84 Court orders that the motion to modify or amend is Denied. (S.O.).
- 1/11/85 Susan J. Davis, John Livengood, and Thomas S. Milligan, as members of the Indiana State Election Board, Laurie Potter Christie, as Executive Director of the Indiana State Election Board, and Edwin J. Simcox, as Secretary of State of Indiana, defendants in Cause No. IP 82-56-C, hereby appeal to the Supreme Court of the United States pursuant to 28 U.S.C. 1253 from those portions of this Court's opinion and order entered December 13, 1984, with respect to the issues raised in Cause No. IP 82-56-C, with (i) declared unconstitutional under the Fourteenth Amendment to the United States Constitution the 1981 Indiana House of Representatives and Senate reapportionment acts and the 1982 amendments thereto, (ii) enjoined the Indiana State officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto, and (iii) ordered the Indiana General Assembly in 1985 to enact legislation to redistrict the State and Reapportion the legislative seats in the General Assembly. Copy of the notice of appeal, docket entries and order sent to the United States Supreme Court.
- 1/5/85 Court reporter files transcript of trial held October 12, 1983—one volume. Court reporter files transcript of trial held November 16, 1983 — one volume.

JA-5

- 2/11/85 Received from the Supreme Court of the United States evidence of the docketing of appeal. Assigned number 84-1244.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IRWIN C. BANDEMER, et al)
)
vs.) Cause No.
) IP 82-56-C
SUSAN J. DAVIS, et al)
)
INDIANA N.A.A.C.P. STATE)
CONFERENCE OF BRANCHES, et al)
)
vs.) CAUSE NO.
) IP 82-164-C
ROBERT D. ORR, Governor,)
STATE OF INDIANA, et al)

ORDER

These causes are before the Court upon the motions of defendants to dismiss plaintiffs' complaints, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Whereupon the Court, having considered the motions and materials filed in support thereof and opposition thereto, and having heard oral argument, hereby rules as follows:

1. Defendants' motions to dismiss are DENIED;
2. Cause Nos. 82-56 and 82-164 are consolidated, *sua sponte*, for all further proceedings including trial;

3. All discovery shall be completed by July 30, 1982.
IT IS SO ORDERED.

DATED this 3rd day of May, 1982.

/s/ Wilbur F. Pell, Jr.

WILBUR F. PELL, JR., Circuit Judge
United States Court of Appeals for the
Seventh Circuit

/s/ James E. Noland

JAMES E. NOLAND, U. S. District Judge

/s/ Gene E. Brooks

GENE E. BROOKS, U. S. District Judge

MEMORANDUM ENTRY

Following the 1980 census, the 1981 Indiana General Assembly reapportioned the voting districts of Indiana's electors. House Bill 1475 was adopted by the Indiana House of Representatives and signed by the Governor. *Ind. Code* §2-1-1.5-1 *et. seq.* (1981). This law divides the state into 77 districts. Sixty-one of the districts elect a single representative, nine districts elect two representatives, and seven elect three representatives. Senate Bill 85, which was adopted by the Indiana Senate and signed into law, *Ind. Code* §2-1-2.2-1 *et. seq.* (1981), divides the state into 50 single-member districts.

The plaintiffs in No. 82-56 are black and white voters residing in various counties in Indiana. They allege in Counts I through III of their amended complaint that the House and Senate reapportionment laws violate the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983. Counts IV through VIII present various pendent state claims under the Indiana Constitution.

The plaintiffs in No. 82-164 are state and county branches of the N.A.A.C.P., and individual black voters residing in various counties in Indiana. They allege in paragraphs 47 through 50 of their complaint that the reapportionment plans violate the Fourteenth and Fifteenth Amendments to the United States Constitution, and Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1971 (C) (1981).

Defendants now move to dismiss both complaints for failure to state a claim. Essentially, defendants contend that allegations of mere political gerrymandering do not raise a justiciable constitutional issue, and that for a cognizable claim of racial gerrymandering, allegations of purposeful invidious discrimination are essential. Defendants consider both complaints lacking justiciable issues for trial.

In *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Supreme Court stated the standard by which a challenge to multi-member district systems is measured:

[W]e have deemed the validity of multi-member district systems justiciable, recognizing ... that they may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' (Citations omitted). *Id.* at 143.

The complaint in No. 82-56 meets this standard. Paragraphs 15 and 16 of the complaint allege that the mixing of multi-member and single-member districts was designed to minimize or cancel out the voting strength of racial or political elements of Indiana electors. These allegations are sufficient to surpass a motion to dismiss for failure to state a claim. At the trial on the merits, however, plaintiffs must be prepared to prove that the reapportionment plan was designed to further the alleged discrimination. *Whitcomb v. Chavis*, 403 U.S. 149; *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980).

The complaint in No. 82-164 also survives the *Whitcomb v. Chavis* analysis. Paragraph 47 alleges that mixing single and multi-member house districts invidiously discriminates against minority voters. Furthermore, paragraph 50 alleges that the Senate reapportionment plan intentionally dilutes black voting strength and minimizes black political influence in Indiana. During oral argument, plaintiffs' counsel recognized that "(p)roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265 (1977).

Therefore, the Court concludes that a genuine controversy exists between the plaintiffs and defendants in Nos. 82-56 and 82-164. Plaintiffs' complaints sufficiently state claims for relief under Rule 8(a) of the Federal Rules of Civil Procedure. Accordingly, defendants' motions to dismiss are DENIED.

**Excerpts from the Deposition of
Robert D. Garton**

[Pages 123-125]

383 Q. Now there were Democrats who were appointed in the Senate to be on this committee, were there not, to be advisors on the committee?

A. Advisors.

384 Q. Who were they?

A. I hope you have the record, because I think that it was Senator Townsend and Senator Carson.

That's my memory.

385 Q. You think Carson was appointed?

A. I think so.

386 Q. And who did that appointment, you did?

A. Yes.

387 Q. What are the advisors supposed to do on committees, what's the role?

A. It's not defined. I'm trying to recall.

The way we operate in our process, you must have four signatures from the four conferees.

And advisory role I think is as much as anything a recognition of personal interest and also the influence.

388 Q. Did the advisors have access to your knowledge to the materials, the maps, before others had access to them, others meaning those not on the committee?

A. I don't know.

389 Q. Were they invited into the discussion of the conference committee to be part of the discussion?

A. As I say, I think there was only one specific meeting of that conference committee. And that's when the public announcement was made.

Mainly because there was nothing to meet about until you had proposed language.

390 Q. Well, I assume a group of Republicans—you don't know how that worked?

A. No.

And in terms of appointments in researching the record I found that when the Democrats controlled the State Senate the conferees were Democrat.

I don't even think they had recognition of Republican advisors. At least the record didn't show it.

And you had to recall what I said, that a conference report must be signed before you can vote on it.

And if someone refuses to sign it, then the pro tem or the speaker can remove the appointments from that House.

But why go through that process when it was indicated to me very clearly that no Democrat would vote for any redistricting plan proposed by Republicans.

391 Q. Who indicated that?

A. The minority leader.

392 Q. Who was?

A. Senator O'Bannon.

And it was reaffirmed by other Democratic senators.

393 Q. To you, personally?

A. Yes.

394 Q. So you'd risk not getting a bill out if you appointed any of them to the committee?

A. Conference report, yes.

Also following the precedent as I said.

**Excerpts from the Deposition of
Charles E. Bosma**

[Pages 51-53, 110-111, 115-117, 163-164, 171]

148 Q. So in any case, going back to the impact of incumbency, were any lines drawn to your knowledge which specifically were drawn the way they were out of deference to incumbency?

A. Absolutely.

149 Q. Which lines were those?

A. All of them.

150 Q. Now I take it that—

A. That was one of the other priorities that we wanted to try to follow. And that was to protect those who were already serving, particularly of our own party.

And you'll have to recognize that reapportionment is a political matter.

151 Q. I think you indicated earlier that there were some cases to your knowledge about incumbency suggesting it was a rightful priority or rightful consideration?

A. I don't think I mentioned that. If I did, I don't recall.

152 Q. So do you have knowledge of the legal basis as you understand the legal basis for regarding incumbency as an important consideration?

A. I don't know that there is a legal basis regarding the incumbency factor.

I think it's a political consideration.

153 Q. Now you mentioned the non-dilution of minorities.

Could you tell me what, to you at least at chair person of the committee, that meant in the 1981 redistricting?

- A. To me that meant that where there was a majority black population, that is more than fifty percent, that non-dilution would be to maintain more than fifty percent in that area.

154 Q. So you're talking about preserving districts which are already more than fifty percent minority?

- A. That's right.

To preserve the majority black population in a district where it currently existed.

155 Q. Now can you tell me what the source of your judgment of that definition is or that understanding is? Did someone tell you that? Did you read it somewhere?

- A. I don't know that I read it somewhere.

I supposed it might have been an assumption on my part that that's what it meant.

But you should not break the possibility of them having a majority vote in the district.

And I think maybe another aspect of that is to try to preserve where it's below a majority, to try to preserve somewhere within close limits the existing percentage of black population.

If a district had 25 percent black population, try to maintain that as nearly as possible.

But you have to recognize that with the out-movement of people in the black community spreading out and dispersing into the white communities that that's not always easy to handle.

* * *

MR. SUSSMAN: Now I'm going to have marked as Bosma No. 10 an article dated March 22, 1981, entitled Political Muscle the Name of Reapportionment Game from the Indianapolis Star, written by James G. Newland, Jr.

(Plaintiffs' Deposition Exhibit No. 10 was marked for identification by the reporter.)

340 Q. This article says, and I'm quoting from it, "Senator Charles E. Bosma (Republican-Beech Grove), the person responsible for drawing the new Senate district map, readily admits that he will hurt the Democrats as much as possible within the U.S. Supreme Court's guidelines. This, he says, is the 'political reality the Democrats will have to face.'"

Is that accurate?

- A. Accurate.

* * *

351 Q. Well, you have indicated several times here today, sir, that you saw redistricting as a political activity and you weren't going to give anything away.

- A. That's right.

352 Q. Now I'm trying to understand from you what techniques then did you use to affectuate the goal of not giving anything away?

Maybe I can be more direct with you.

- A. Make every incumbent Republican district as safe as possible.

353 Q. How is that done?

- A. Well, by following the voting trends and putting sufficient Republicans in that district or encompassing the Republicans in that district in sufficient numbers to give a majority in that district.

354 Q. Now were there any incumbent Republicans who were in areas that were either marginal or Democratic that profited from the technique you just stated?

A. Yes, I suppose so.

Because we had some Republicans elected in 1978 who were elected in the landslide and who might be in what were called marginal districts.

And we tried to improve their district somewhat.

Now it wasn't always possible in every instance.

But I think there probably are two or three that will find that their districts are more to their liking than they were when they were first elected.

* * *

485 Q. Now is there a computer at the state legislature?

A. They have a computer available for I know running financial statistics.

486 Q. I take it you're not aware of whether it's available for political reapportionment?

A. I would assume that it would not be available for political reapportionment.

That's the Legislative Service Agency, a bipartisan agency.

And any partisan activity was strictly prohibited on the part of the employees. And the utilization by a party of their facilities is not permitted.

487 Q. So on that basis reapportionment probably would not have been doable on it?

A. Well, I suspect that a plan could have been done on that.

But certainly any political implication would be removed from that.

488 Q. And Legislative Services in this state has not been used to draw plans; is that correct?

A. That's correct.

They were very careful to avoid being associated with anything with regard to drawing the reapportionment plan.

489 Q. Is that part of Legislative Services charter?

A. That was a decision on their part. Because they were bipartisan and they did not want to become charged with being a partisan operation.

And reapportionment has political implications.

* * *

506 Q. Now were there any numeric goals that were set in concert with anyone at this point with regard to how many districts would be districts—and now I'm making reference specifically to exhibit 13—how many districts would come out over 55 percent Republican in terms of the median voting?

A. There were no specific goals. We didn't have a goal in mind.

We wanted to preserve the incumbents that we have already in the Senate.

507 Q. How many were there?

A. 35.

508 Q. So it's fair to say that that was the goal?

A. That was one of the objectives, to preserve the incumbents from our party.

**Excerpts from the Deposition of
J. Roberts Dailey**

[Pages 19-20, 33-34, 63]

- 74 Q. Did you, yourself, discuss with Mr. Mangus the criteria which would be established and on which redistricting would be based apart from a discussion you have indicated that these two principles would be followed in?

Did you discuss any other principles with him, any criteria?

A. Oh, sure. I'm sure.

- 75 Q. What other criteria principles do you recall discussing?

A. It would have been political in nature.

- 76 Q. What would those have related to?

A. Save as many incumbents as possible. Have as many Republican districts as possible.

* * *

- 142 Q. Now I'm going to give you Dailey No. 5 and I'm going to ask you to read as much of that article as you want.

My questions are going to focus on the 4th paragraph on the right-hand column. So if you want to read the whole article, you can.

A. Fourth paragraph, okay.

- 143 Q. Mr. Newland writes in this article, "Their biggest gun is the threat of stripping Marion County of multimember House districts in favor of single member districts. Single member districts would likely mean that Democrats would be elected to at least two of the G.O.P. seats, if not more."

Now was that something that you discussed?

A. Yes.

- 144 Q. And was your conclusion that the single member district would have that effect or might?

A. I was told that.

- 145 Q. By whom?

A. Oh, it was general conversation.

- 146 Q. Did you have conversation with Mr. Sutherlin about that?

A. I doubt that.

I did not consult with Sutherlin very often, no.

- 147 Q. Mangus?

A. Yes.

- 148 Q. Would you say that was a factor in maintaining the multi-member districts?

A. Some.

- 149 Q. What other factors were there in maintaining multi-member districts?

A. None.

* * *

- 314 Q. Let's go down the list. I believe we just finished 31. Now we're up to 48, 49, 50, 51 and 52.

What I would like you to do here again is to give me whatever reasons were operative to your mind in maintaining or creating multi-member districts with regard to 48 through 52.

A. Political.

- 315 Q. What were the political factors?

A. We wanted to save as many incumbent Republicans as possible.

- 316 Q. What alternatives to maintaining the multi-member districts would have threatened them in your judgment?

A. Single member districts.

**Excerpts from the Deposition of
Richard W. Mangus**

[Pages 29-31]

119 Q. Now were there any written guidelines that you all gave to Campbell?

A. No.

120 Q. Did you give him oral instructions?

A. Yes.

121 Q. What did you tell him the first time you gave him instructions?

A. I will talk in generality.

We decided on four things.

We decided first we had to protect minority.

Secondly, we would use—well, if you want to call it incumbent map or we would draw as near as possible the same type of map we had drawn in 1972.

Three, we would stay within the guidelines of, I think we decided four percent. But then a year later the court ordered or a federal court decision brought us down to two percent.

122 Q. The federal court procedure pertaining to state legislature as you understand it brought it to two percent?

A. That's my understanding. Minnesota or someplace.

Anyhow our chief legal advisor told us to get them all down to 2 percent.

When we started out we were going to stay within 4 percent I believe was our figures.

We was going to protect the community of interest.

Then we would look at the political possibilities of them.

123 Q. And that was the order?

A. That was the order that was considered, yes.

124 Q. Now you said the first thing you had to protect minorities.

What do you mean by that, sir?

A. Well, I'm just giving you my understanding what the legal people are telling me.

125 Q. Who told you that, your lawyers?

A. Mr. —

126 Q. You're pointing to Mr. Evans. I assume he told you this, all right.

What was your understanding about you had to protect minorities? What did that mean to you, sir?

A. It means we could not — for an example, if you had a district that had 40 or 50 percent black in it, you couldn't cut it down to 30, 10 or 15. You couldn't dilute it in other words.

Excerpts from the October Trial Transcript

[Direct Examination of David Dreyer]

[Pages 74-75]

JUDGE BROOKS: You have been around a long time. What was wrong with the way they did it procedurewise? Haven't they done bills like that before?

THE WITNESS: It is an unconventional method.

JUDGE BROOKS: What do you mean by that?

THE WITNESS: To pass a bill completely without the intended substance.

JUDGE BROOKS: You have seen them before?

THE WITNESS: I have seen it before.

JUDGE BROOKS: Does that violate any rules that you know of?

THE WITNESS: No.

MR. BOEHM: Your Honor, our contention is not that this violated legislative procedure, but it is evidence — when he finishes his story —

JUDGE BROOKS: I understand.

MR. BOEHM: Okay.

A (continuing) The Speaker of the House and the President Pro Tem of the Senate appointed conferees to the bill, all four Republican. Then in the last week of the session the public was told that there would be a hearing at which the contents of the bills would be released to the public. We obtained a copy from the Republicans the night before that hearing. That hearing was attended primarily by members of the legislature and the press. The contents of the bills were revealed and later that week, on the last session day — well, pardon me, they were subsequently — there were a few modifications made and subsequently signed by the conferees and sent back to both Houses for final passage, ratification.

Q How close to the end of the session was it when the bill first became known to you, the contents of the bill, the districts?

A It was the last week of the session, probably the morning of either Tuesday or Wednesday of that hearing.

Q And when did the session —

A The session closed that Friday.

* * *

[Direct Examination of Gordon Henderson]

[Pages 88-93]

Q Why is adherence to existing political subdivisions relevant?

A For two reasons. As in Indiana, and Indiana is not alone in this regard, there are recognitions in the state constitutions and statutes that compel respect to some degree. But I think rather more to the point, political boundaries have significance, they are often administrative units, they are established. The voters, for example, know where they are. They have a connection. They know that they live in district thus and such, and to totally — or even, indeed, in a particular precinct when they get in the habit of going to a particular voting place. Existing political units are used as the basis of campaign organizations. There are many powerful political — good and sufficient political reasons why one ought to disrupt existing political units as little as possible.

Q You are aware that the Indiana House plan involves multi member, as well as single member, districts?

A Yes, I am.

Q Now, do multi member districts have the potential to be used by the map maker to disadvantage a targeted group, whether it be racial or political or anything else?

A Yes, indeed, they do. I have been on record in this respect for some time. There is a section pending in one of my books which says multi member districts, and other discriminatory devices, they have a significant potential for discrimination.

Q Could you develop a simple graphic example for the Court that would illustrate that, using the sheet that Mr. Swarbrick is now unveiling for you?

A Yes.

Q Would you please do so,

A I have put on this large sheet of paper 16 letters. I have put down eight D's and eight R's. They are staggered, D, R, D, R across in each row, and then R, D, R, D, and so forth. The D stands for — this is a terribly oversimplified example. The D stands for a Democratic concentration that approximately equals the number of people required to make a district, or a solid majority of a particular district, and similarly the R stands for an equivalent Republican concentration.

Now, if we drew 16 single member districts we would obviously have eight Democratic districts and we would have eight Republican districts. And with single member districts, therefore, the division would be S for single member would produce a 50/50 division of seats. If, on the other hand, we draw some triple member districts, like so, and we group two Republicans and one Democrat together in a three member seat, that clearly is going to be a Republic district. And if we do that consistently throughout this entire grid we will end up — for each one of these groups of four we will end up with a division under triple districts of 75 per cent Republican, 25 per cent Democrat. This is one way simply of submerging sizable concentrations of people in a multi member district so as to work advantage to whoever it is you are trying to work this advantage to.

Q Now, you have given us that rather simple example. In general, can you explain for the Court the underlying theory, or facts, that permit multi member districts to be used to disadvantage any group that is the target of the map maker?

A The organizing principle that works here is that if you draw the lines just right you will take what would otherwise be a sizable majority in a single district and make it a large, but nonetheless submergible, minority in a multi member district, whether you are dealing with two or three or, indeed, more than that member districts.

Q Now, have you taken a look at the maps of the Marion County, Indiana — would you give him the House overlay, please.

You have before you Exhibits 7 and 8, which you will recall Mr. Dreyer explained as a color coded map of Marion County, Indiana, using the 1976 Reporter of the Supreme Court race results, color coding it by Democratic vote and giving a grey or black composition to the 75 per cent plus Democratic areas, brown for 65 to 75, red for 55 to 65, and blue for 45 to 55, and so on. First of all, you heard Mr. Dreyer tell us that in his view the Reporter's race was a reasonable gauge of raw party strength, relatively free from any individual candidate's strengths or weaknesses. Do you agree or disagree with that proposition?

A I do agree with that.

Q How about his selection of 1976 as a "normal political year"?

A I think that is a reasonable choice.

Q Now, having done that, do you find anything in Exhibits 7 and 8 that reflects any of the phenomena you just described with respect to multi member district use?

A Yes, I do.

Q Can you explain it to the Court, please?

A If you will look particularly at the 51st, 48th and 52nd districts. Looking at No. 51 first, you will see that the black area, which is those areas 75 per cent plus Democratic, have all been located, with I think only one exception, in the 51st district. This, therefore, is taking a concentration of Democrats and concentrating them in one particular district. There are two devices for doing this mentioned in perhaps the best known of all books on reapportionment and gerrymandering, and that is Robert Dixon's Democratic representation, called stacking and packing, in which you take the bulk of people to whose disadvantage you care to work as a map maker, and if there is nothing else you can

do, you concentrate them in one district so that they are an overwhelming majority in that particular district.

Again looking at 48, 51 and 52, it is also clear that those that are brown, and particularly those that are red areas, the red areas representing districts 55 to 65 per cent Democratic, have been split off, and that it is less clear, and somewhat more clear on other maps, but it can be seen as an example, again quoting Dixon, of cracking where you take a portion of a — the population, whatever it is that you seek to disadvantage and divide it among one or more districts. If you will look at those red areas, there are sizable numbers of them in 48, 52, also over on the east in 50 and a couple up on 49 and, of course, there are some in the 51st. That is a very considerable division, and even if we didn't have this map there might be reason to suspect what was going on by looking at the shapes. Shapes, by themselves, do not, I think, define a gerrymander, but I have on many occasions, including in my writings, indicated that — and certainly in testimony in Courts, that shapes are inherently — make one inherently suspicious, and you just glance at the upper northeast corner of 52nd and there is a lovely little eagle's head there and some other narrow shapes, and not in just this map, but other maps as well.

* * *

[Cross-Examination of David Dreyer]

[Page 164]

Q What effect the Carson plan would have had on the voting strength of black voters throughout the state in all the different districts. Did you make any study of that?

A Yes, I did make a study of the percentage of black population in some of the Carson plan districts.

Q But I am talking about all of the districts.

A Not every one.

Q In fact, you only did it for Marion, Lake and Allen, am I right? Well, strike that. At least you haven't done it for all of the state, have you?

A I have not done it for all of the state.

Q And there is no exhibit that shows that, is there, for all of the state?

A I have not prepared an exhibit of that.

Excerpts from the November Trial Transcript

[Cross-Examination of David Dreyer]

[Page 30]

Q As I understand your testimony, Mr. Dreyer, you were not particularly concerned about the percent black in those other districts that were not black majority? Isn't that what you told me in your deposition?

A There were very few blacks left for those other districts.

Q And you were not particularly concerned with the percent of black that was in those other districts in the Crawford plan?

A No, not particularly.

* * *

[Direct Examination of Craig C. Campbell]

[Pages 140-141]

A The multi-member districts that were split were done so at the request of the legislators themselves. Multi-member districts were — first let me back up a minute. We began with the existing districts as a starting point. If the incumbents wished their districts to be made into single member districts, and that could be done without any political impact either way, then we did so.

Q How do you mean, political impact either way?

A Where, for example, the district was a Democrat and a Republican, if both of them agreed — for example, if just a Republican had come to us and said "I want this split into a double member district," we would not have done so unless the Democrat would have agreed also.

Q And, of course, you followed the one man, one vote concept as well, did you not?

A Of course, yes.

Q Now, what, if anything, did you do to protect black voting strength when these four districts were split, Mr. Campbell?

A We made every effort to insure that to the greatest extent possible the black persons located in those districts were gathered or concentrated as much as possible in one of the two districts so as not to be split up more than necessary.

Q When a two member district was made into two single member districts?

A Yes.

* * *

[Pages 143-149]

Q I'm going to ask you some questions specifically about these four districts that became single member and we can

discuss those. How about the district in the South Bend area, was that converted from a multi-member district to two single-member districts?

A Yes.

Q Why was that done?

A At the request of the legislators.

Q And what was the party of the two members of the two member district at that time?

A One was Republican and one was Democrat.

Q And are there two new single member districts where the multi-member district was in the South Bend area?

A Yes.

Q And what is the party of the representatives in these now single member districts?

A One Republican and one Democrat.

Q And has the black voting strength in the two member district been protected?

A Insofar as possible, yes.

Q Could you tell the Court the black percent before and after reapportionment?

A Before —

Q You may look at an exhibit if you have one.

A Before reapportionment —

Q Tell the Court what exhibit you are looking at.

A Well, I do not have them numbered. I don't know that I need them.

Q This is Defendant Exhibit No. 1, which is the computation, if you care to refer to that. But go ahead.

A Prior to reapportionment the two member district was 4.9 percent black. After reapportionment the two single

member districts, one was 2 percent black and the other was 9 percent black.

Q And was this changed, then, in accordance with the wishes of the representatives?

A Yes.

Q Were there any changes made in any other metropolitan area in addition to South Bend?

A Yes.

Q Where was that?

A The Evansville area.

Q What happened down there? Tell the Court what happened down there, as you told us in South Bend.

A Again, the legislators requested that the district be divided into two single member districts, which we did so, again trying to protect black population.

Q What was the political party of those representatives?

A I believe it was two Democrats.

Q And the two single member districts are now what political --

A Two Democrats.

Q What changes, if any, were made in the Elkhart area, which would be the third multi-member district change?

MR. SUSSMAN: Could you point out the districts as you go along? It would make it quite a bit easier.

Q You might refer to the district numbers, if you would, and particularly in the Elkhart area. What is the Elkhart --

A The Elkhart area, old District 11 and new Districts 3 and 4.

Q Why was that change made?

A Again, at the request of the incumbents.

Q Both Republican?

A Yes.

Q And there was very little black percent at all in that area?

A Very little.

Q And that was made at the wishes of the representatives again?

A Yes.

Q And were there any changes made in Lake County, Mr. Campbell?

A Yes, there were.

Q Lake County, just tell us what happened in Lake County, because that is a little complicated.

A Well, yes, it is. Lake County was exceptionally difficult to work with. The population distributions geographically, combined with the way they have their precincts drawn up there, made it very cumbersome to work with. In addition, Lake County, the northern part of Lake County, lost approximately 70,000 persons in population from 1970 to 1980. The southern portion of it gained about 25,000. So there was a net loss of about 45,000 persons from Lake County. Of that loss, I believe it's 29,000 persons were lost from House District -- old House District 5, which is the Gary area, and it has two black Democrat representatives. In looking at it from a very purely technical standpoint, what should have been done was to drop -- simply make old House District 5 a single member district. However, the problem with doing so was that it would have seriously endangered one of the black Democrat representatives and --

Q Old District 5 was a district that was a two member district represented by two Democrats?

A Yes.

Q And do you remember their names?

A Rayfield Fisher and Carolyn Mosby, I believe.

Q And those were two blacks?

A Yes.

Q That was in the Gary area?

A Yes.

Q And you say there was how big a drop in population in that district in the ten years?

A Twenty-nine thousand.

Q And what options did you consider then, Mr. Campbell?

A Well, the option would have been to have made District 5 a single member district and — well, that would have been the other option. It was either to make House District 5 a single member district or some other district in that northern part of the Lake County a single member district.

Q And did you make District 5 a single member district?

A No, we did not.

Q Why not?

A Because we did not want to endanger any black Democrat representatives.

Q And what would have happened if you had made District 5 a single member districts?

A Then one of the two would have undoubtedly lost.

Q They would have fought each other?

A Yes.

Q What did you do instead of that? Instead of making this heavily — what was the black percent in District 5?

A It was 91.2 percent, I believe. Yes, 91.2 percent.

Q Instead of making that a single member district, what did you do?

A We expanded this geographical area to pick up greater numbers of people to meet the one man, one vote test, and made a different district a little farther south into a single member district.

Q And what was the black percent in District 5 once you reapportioned — It has a new number now?

A Yes, it became District 14.

Q Okay.

A District 14 currently has approximately 70 percent black. 69.9 percent.

Q But what happened to other districts in Lake County because of this drop in population that you have mentioned?

A One of them became a one member district. From a two to a one.

Q And that was old District what number?

A It roughly corresponded to old District 3.

Q And what happened to it?

A It went from a two member district to a single member district.

Q And what was the race of the — these are all Democrats?

A Yes.

Q What was the race of the two Democrats in this district, old District 3, now new District — or old District 5, I'm sorry. What is the old district that had two Democrats?

A 3.

Q And they were white Democrats?

A Yes.

Q What were their names?

A Chet Fobis and Bill Drodza.

Q And these two white Democrats were then put into the single member district?

A Yes.

Q And what other changes were made in Lake County?

A Old District 2, which had been a two member district, was continued as a two member district, but it picked up a substantial number of — it had lost some population, and in adding to it a fairly significant number of blacks were added to that district.

Q What is the new number of old District 2?

A 12

* * *

[Pages 151-152]

Q Now, after redistricting you say District 12 had a 30.6 percent black voting strength?

A Yes.

Q What has happened in that district since reapportionment in terms of its representation?

A Prior to reapportionment it was represented by two white Democrats. Since reapportionment it is represented by one white Democrat and one black Democrat.

Q This is the first time that a black Democrat had ever been elected from that district, is that right?

A Yes, it is, to my knowledge.

Q Were any other requests made, to your knowledge, to convert specific multi-member districts to single member districts?

A Other than the four we have discussed, no.

No. 84-1244

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

SUSAN J. DAVIS, *et al.*,

Appellants,

v.

IRWIN C. BANDEMER, *et al.*,

Appellees.

**APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF INDIANA**

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether the court below in addressing a claim of partisan political gerrymandering erred in not following the decisions of this Court, and the decisions of the U.S. Court of Appeals for the Seventh Circuit that have relied on the decisions of this Court, that such a claim raises issues that are inherently political and not justiciable.

2. Whether the court below erred in holding that a major political party which had enough "safe" seats and was found to have enough "competitive" seats to control both the Indiana House of Representatives and the Indiana Senate, is a "political group" entitled to the same constitutional protection as a racial minority group.

3. Whether the court below erred in holding the 1981 Indiana reapportionment acts violated the Equal Protection Clause solely because of "political gerrymandering", even though these acts were found to have followed (i) the principal neutral criterion of "one man- one vote" and then (ii) the criterion of no minority vote dilution preserving Black voting strength so that the number of Black-majority districts is proportional to Black population, thus protecting the voting rights of Blacks as Blacks as required by the U.S. Constitution and the Voting Rights Act, and then in fact followed the neutral criteria of preserving the cores of previous districts, avoiding incumbent contests and preserving multi-member districts for both Republicans and Democrats unless all the House members from such a district, of either party or race, requested that their district become single member districts.

4. Whether the court below erred in placing the burden of proof on the State of Indiana to prove that the Indiana reapportionment acts are constitutional under the Equal Protection Clause, even though the district population

deviation was only approximately 1% and the Indiana General Assembly followed neutral criteria previously required by this Court or recognized as proper and appropriate under state law by this Court, and where the alternate plans of the appellees Bandemer, *et al.* were not even presented until 1982, and except for "one man-one vote" did not even purport to follow any of these same neutral criteria and, as to the House plan, except in certain metropolitan areas, used the same electoral district lines which were severely criticized by the court below.

5. Whether the court below, in finding the Indiana reapportionment acts to violate the Equal Protection Clause solely because of "political gerrymandering", erred in making no determination of the credibility of statistical evidence and engaging instead in a totally discretionary invasion of the political process with no clear enunciation of standards regarding issues such as the definition of a political group, the form of representation (other than proportional) required, how a racial minority and a political group can both be given equal priority in representation in urban areas, the priority to be assigned to "community of interest", the extent to which partisan political comments of legislative leaders in any redistricting would again invalidate a reapportionment plan, and the extent to which any reapportionment plan must also assign priority to "ethnic" minorities and "economic" minorities.

THE PARTIES

Appellants in this proceeding are *Susan J. Davis*, *John Livengood*, and *Thomas S. Milligan*, as members of the Indiana State Election Board, *Laurie Potter Christie*, as Executive Director of the Indiana State Election Board, and *Edwin J. Simcox*, Secretary of State of the State of Indiana. Appellees from Cause No. IP 82-56-C are *Irwin C. Bandemer*, *Obi Badili*, *Ra-Nelle Pearson*, *George Womack Jr.*, *Edward O'Rea*, *John Higbee*, and *David Scott Richards*.

Appellees who were originally plaintiffs in the consolidated case, Cause No. IP 82-164-C, are *Indiana N.A.A.C.P. State Conference of Branches*, *Indianapolis Branch N.A.A.C.P.*, *Fort Wayne Branch N.A.A.C.P.*, *East Chicago Branch N.A.A.C.P.* *Thomas Bunnell*, *Edward Richardson*, *James E. Clark*, *Bervin E. Caesar*, *Elizabeth Dobyne*, *Dr. Benjamin Grant*, *John Stott*, and *Eunice Roper Allen*.

Appellees by virtue of their status as defendants in the consolidated case (who are not appellants) are *Robert D. Orr*, Governor of the State of Indiana, *J. Roberts Dailey*, Speaker of the Indiana House of Representatives, *Robert D. Garton*, President Pro Tem of the Indiana State Senate, *Richard Mangus*, Chairman of the Standing Committee on Elections and Apportionment in the Indiana House of Representatives, and *Charles Bosma*, Chairman of the Standing Committee of Legislative Apportionment and Elections in the Indiana State Senate.

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No. 84-1244

IN THE

Supreme Court of the United States

October Term, 1984

SUSAN J. DAVIS, *et al.*,

Appellants,

v.

IRWIN C. BANDEMER, *et al.*,

Appellees.

**APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF INDIANA**

BRIEF OF APPELLANTS

This appeal is from the judgment and decision of the United States District Court for the Southern District of Indiana, sitting as a three-judge court, entered on December 13, 1984, which (1) declared unconstitutional under the Equal Protection Clause of the Fourteenth

Amendment the 1981 Indiana House of Representatives and Senate reapportionment acts and the 1982 amendments thereto; (2) enjoined the Indiana state officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto; and (3) ordered the Indiana General Assembly to enact legislation in 1985 to redistrict the State and reapportion the legislative seats in the General Assembly.

OPINIONS BELOW

The opinion of the three-judge court below is not reported, but the majority opinion and order and the related concurring and dissenting opinion by Judge Pell are set out in Appendix A to Appellants' Jurisdictional Statement, beginning at A-1.¹ The court's opinion and order denying Appellants' Motion to Modify or Amend, together with a dissenting opinion by Judge Pell, are set out in Appendix C to the Jurisdictional Statement, beginning at A-63.

JURISDICTION

This action was initially brought by appellees Bandemer, Badili, Pearson, Womack, O'Rea, Higbee and Richards challenging the 1981 Indiana House and Senate reapportionment acts under the Fourteenth Amendment to the Constitution of the United States, under 42 U.S.C. §1983, and under the Constitution of the State of Indiana.²

¹ References to the appendix to the Jurisdictional Statement are in the form "A- ." References to the Joint Appendix are in the form "JA- ."

² A second action, with a different group of plaintiffs (the NAACP plaintiffs) and challenging the reapportionment acts on the basis that the electoral district lines did not give Black citizens, as Blacks, the maximum number of Black-majority districts, was subsequently filed as Civil Action No. IP82-164-C. By order dated May 3, 1982, the two actions were consolidated by the court below. The issues raised in the second action are not a part of this appeal. In addition, one of the state constitutional provisions on which Bandemer *et al.* relied has since been repealed (A-52).

Jurisdiction in the court below was based on 28 U.S.C. §§1331, 1343(a), 2201 and 2284 for the federal constitutional and statutory claims and on pendent jurisdiction for the state constitutional claims. A three-judge panel was appointed pursuant to 28 U.S.C. §2284.

After trial, the three-judge court entered its opinion and order, including injunctive relief, on December 13, 1984. Appellants filed a timely Motion to Modify or Amend (A-57) on December 18, 1984, requesting that the court alter or amend its opinion and order. This motion was denied on December 27, 1984 (A-63). A notice of appeal (A-67) was filed in the United States District Court for the Southern District of Indiana on January 11, 1985, its timeliness being governed by 28 U.S.C. §2101(b). Probable jurisdiction of this appeal was noted on March 25, 1985.

Jurisdiction of this appeal is conferred on the Court by 28 U.S.C. §1253 since the order appealed from involved the granting of an injunction after hearing by a three-judge court. Cases sustaining the jurisdiction of this Court on appeal are *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194-95 (1972).

STATUTES INVOLVED

Section 1 of the fourteenth amendment to the United States Constitution provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The 1981 Indiana House of Representatives and Senate reapportionment acts as amended by the 1982 amendments

thereto appear at Ind. Code §§2-1-1.5 and 2-1-2.2 and are set out in Appendix E to the Jurisdictional Statement, beginning at A-69.

STATEMENT OF THE CASE

Following the 1980 census conducted by the United States Census Bureau, the Indiana General Assembly³ began the process of reapportioning the State based on compilations it received from that agency.

On January 13, 1981, House Bill 1475 was introduced in the Indiana House as being relevant to reapportionment. Similarly, Senate Bill 80 was introduced on February 24, 1981. These bills were characterized as "vehicle bills" and were devoid of significant content as filed. Such vehicle bills are used by the legislative leadership of both parties, the Democratic leader in the State Senate, Senator O'Bannon, introducing, for example, nine such vehicle bills in 1981. (Exhibit Y) The reapportionment bills were passed in that form and were referred to the other house where amendments were made. The sole purpose for this particular legislative process is to refer both bills to a conference committee. (A-7)

The reapportionment bills were thus referred to a conference committee for action. The Senate Democratic leadership told the Senate Republican leadership that no Democrat would vote for any reapportionment plan prepared by the Republicans. (Garton Deposition, JA-11;

³ The General Assembly is Indiana's bicameral legislature, consisting of a House of Representatives with 100 members and a Senate with 50 members. House members serve a term of two years and Senate members serve a term of four years with one-half of the Senate members elected every two years. The General Assembly is not a full-time legislature. Rather, in odd numbered years it meets for a maximum of 61 session days, and in even numbered years for a maximum of 30 session days. Apportionment of the state into districts represented in the General Assembly is done by legislative act, signed by the Governor into law. The opinion of the court below gives a more detailed description of the General Assembly (A-5, A-6).

Bosma Deposition p.196) To advance the legislative process all conferees appointed were Republicans—State Senators Charles E. Bosma and James Abraham and State Representatives Richard W. Mangus and Norman L. Gerig. All were members of their legislative body's respective elections and apportionment committees. Certain Democratic advisors were appointed, but they had no committee vote. (A-7)

To aid in the process of legislative map making, the Republican State Committee, a political organization, contracted with a Detroit, Michigan computer firm, Market Opinion Research, Inc. ("MOR"). The Republican State Committee paid Two Hundred Fifty Thousand Dollars (\$250,000.00) for MOR's services and the computer equipment was housed in State Committee headquarters. There was limited access to the equipment and its output. Generally speaking, minority party members had no direct access to the information provided to MOR or to the output from the computers. (A-8) During reapportionment, however, at the request of minority legislators changes were made in the reapportionment bills to accommodate Democrats and to avoid putting Democratic incumbent Senators into the same district. (Bosma Deposition pp. 194-95; Mangus Deposition pp. 54, 57-59)

Meanwhile, the minority party members did have census compilations provided by the United States Census Bureau from which they began drawing their own map, albeit by less sophisticated means than their Republican counterparts. The reapportionment maps and the district lines could not be determined until the computer information was available, and computer tapes were not even available until some time in the middle or latter part of April, 1981. (Mangus Deposition pp. 20, 47)

The majority party, through its conference committee, revealed the product of the MOR-aided map drawing during the last week of the regular 1981 session. After floor debate, certain changes were made in the reapportionment

bills to accommodate the wishes of members of the minority party. (Bosma Deposition pp. 194-95; Garton Deposition p. 38) The conference committee report was introduced for vote in both houses of the General Assembly on April 30, the final day of the 1981 Regular Session. The Senate adopted the report (Roll Call 673) along party lines, 33 to 15. The House similarly adopted the report (Roll Call 844) along party lines, 59 to 40. The Indiana Journal reports comments by Senator Townsend for April 30, 1981, that the Democrats had forty hours to review the districting of more than 4,000 precincts. The Governor signed the bill into law on May 5, 1981. (A-9) The procedures followed in the passage of these Acts were in accordance with all rules and legislative procedures of the General Assembly and were substantially the same as those procedures followed in 1965 and 1971. In each of those years the conference committee members were all members of the majority party, which in 1965 was the Democratic Party, and in each case the bills were passed at the very end of the Session. (Exhibits N, O, P)

The General Assembly followed certain neutral criteria in adopting the Indiana reapportionment acts in 1981 ("House Plan" or "Senate Plan" or "acts"). The principal criterion was "one man, one vote", resulting in a population deviation of approximately one percent. (A-10) Next, the General Assembly tried not to dilute Black voting strength. (A-17) By the use of a "no retrogression" rule, Black representation was made proportionate to Black population in Indiana and the number of Black majority districts existing before reapportionment was preserved, in spite of the fact that there was a tremendous drop in population in the Black majority districts in the urban areas since the prior reapportionment.⁴ (A-17, A-21)

⁴ By following these guidelines, the court below found the Indiana General Assembly protected the voting rights of Blacks as Blacks as required by the U.S. Constitution and §2 of the Voting Rights Act of 1965, as amended in 1982. (A-21).

Subject to these priority guidelines, the General Assembly then followed the neutral criterion of "least changed plan" by not placing two or more incumbents in the same district, by preserving the cores of existing districts, and by continuing existing multi-member districts in the House except where all of the Representatives from any such multi-member district, of either party or race, requested a change to single member districts. (A-18; November Transcript pp. 140-41, JA-30) Multi-member House districts have been used in Indiana during this century (A-19) and are used in urban areas with heavy Black population and also in other areas with predominantly white population, although a higher percentage of Blacks than Whites reside in multi-member districts. (A-18) They are used whether the members are Democrats, Republicans or both Democrats and Republicans in the same multi-member district. Representation is not proportional between the political parties in the multi-member districts in Marion and Allen Counties in that 86% of the House seats in Marion and Allen Counties are now held by Republicans, but 46.6% of the population, the court below held, are identifiable as Democratic voters. (A-19, A-20)

After passage of the Acts on April 30, 1981, the matter was settled until 1982 when certain revisions were made. During the 1982 Session the Plaintiffs presented the "Crawford Plan" for the House and the "Carson Plan" for the State Senate.

The Crawford Plan changed existing multi-member districts to single member districts and adopted as its own the sixty single-member districts contained in the current House Plan. (Mangus Deposition Exhibit 5) It changed the districts in Marion, Allen and Lake Counties to maximize the Black vote in those three counties.⁵ (Exhibits 202, 207,

⁵ Representative Crawford testified that the purpose of the changes proposed by the Crawford Plan was to maximize Black-majority districts and "to allow blacks to be similarly situated as... the majority of other voters in the state and to make a majority decision." (November Transcript pp. 80-81, 118). The changes proposed to attain this purpose were not approved by the court below.

212, QQ, RR) The impact on Black voting strength of the Crawford Plan is only known, however, in fifteen of the forty districts it created (listed in Exhibit 215, p.6).

The impact on Black voting strength in any of the forty-five Senate districts in the Carson Plan not listed in Plaintiffs' Exhibit 215, p. 7, is also not known. The Carson Plan also would have maximized Black voting strength in Marion, Lake and Allen Counties by creating the maximum number of Black-majority districts.⁶ (Exhibits 204, 209, 214)

In Indiana, there is a heavy concentration of Democratic voters, including Blacks, in the urban counties, but only a minority of Democratic voters scattered throughout the rest of the districts. (Exhibit 216, JA-62) In the 1980 election, before reapportionment, thirty-five Republicans and fifteen Democrats were elected to the Indiana Senate, and sixty-three Republicans and thirty-seven Democrats were elected to the Indiana House. (Exhibits II, JJ) In the 1982 election, following reapportionment, there was an increase of three Democrats in the State Senate and six Democrats in the Indiana House. (Exhibit JJ, p. 1)

In the Indiana House in 1982, all 100 seats were up for election. Fifty-seven Republican candidates were elected to serve in the Indiana House; forty-three Democrats were elected to the House. In the Indiana Senate, twenty-five seats were up for election. Thirteen Democrats and twelve Republicans were elected to Senate seats.

Based on the 1982 election (called "most significant" by the court below), in the Senate there would have been thirteen "safe" Democratic seats and eighteen seats in the "competitive" range of 45%-55%, totaling thirty-one of the fifty Senate seats. (A-120) The 1982 election in fact resulted in proportional representation of the two political parties in the Indiana Senate.

⁶ This was also not approved by the court below.

In the House, based on the 1982 election there were twenty-eight "safe" Democratic seats and thirty-nine "competitive" seats in the 45%-55% range which gave the minority party an opportunity to win a total of sixty-seven of the 100 House seats if they had won all "safe" and "competitive" seats. (A-12; A-121)

In January, 1982, prior to the 1982 elections, this lawsuit was filed by certain Indiana Democratic Party members. In summary, the plaintiffs alleged that the Acts were intended to, and do, discriminate against Indiana Democrats. They claimed that such "political discrimination" is a violation of Fourteenth Amendment guarantees of equal protection as well as Indiana constitutional prohibitions against treating electors unequally and unnecessary division of counties in Senate districting (since repealed). A two-day trial was held (in October and November, 1983) during which evidence was taken, and all deposition testimony was admitted as well (October Transcript p. 27; November Transcript p. 114).

A majority of the three-judge court agreed that the acts were unconstitutional under the Fourteenth Amendment as a partisan political gerrymander. The court below found the unusual shapes of certain specified House Districts, which however generally observed township lines, indicated a lack of consistent application of community-of-interest principles.⁷

The court below entered an opinion and order December 13, 1984, enjoining Indiana officials from holding elections pursuant to the Acts at any time subsequent to November 6, 1984 and giving the 1985 Session of the Indiana General Assembly, presumably either the regular session or a special session if necessary, the opportunity to enact legislation to comply with the court's order. (A-33) The court retained jurisdiction to take such further action as it

⁷ Compactness was a neutral criterion followed during reapportionment if the "numbers fit". Mangus Deposition, p.52.

deemed necessary if the General Assembly did not act.

Judge Wilbur Pell of the United States Court of Appeals for the Seventh Circuit, a member of the three-judge panel, concurred in part and dissented in part. He concurred that there was no finding of constitutional or statutory violations insofar as the NAACP plaintiffs were concerned, but dissented from the majority's decision that the Indiana General Assembly had violated the Equal Protection clause of the Fourteenth Amendment by diluting the voting strength of the Plaintiffs as Democrats.

On December 18, 1984, State officials asked the court below to clarify its order in certain specific respects, including what priority to assign to its new constitutional prohibition against partisan political gerrymandering, which conflicts in certain important aspects with the neutral criterion used by the Indiana General Assembly of preserving Black voting strength. (A-57) The court denied this request for clarification by order entered December 27, 1984, Judge Pell concurring in part and dissenting in part. (A-63).

SUMMARY OF ARGUMENT

The court below erred in considering a claim of partisan political gerrymandering justiciable at all and in holding on the record before it that the Indiana reapportionment acts violated the Equal Protection Clause solely on the basis of partisan political gerrymandering. This Court has previously refused to consider such claims justiciable, and consideration of such claims would require determination of issues for which there can be no manageable judicial standards. The court below acknowledged that the Indiana reapportionment acts followed the principal neutral criterion of "one man-one vote" and then the criterion of no minority vote dilution preserving Black voting strength so that the number of Black-majority districts is proportional to Black population in compliance with the U.S. Constitution and the Voting Rights Act as amended in

1982, and then followed the neutral criterion of "least changed plan" by preserving the cores of previous districts and avoiding incumbent contests and by preserving multi-member House districts for both Republicans and Democrats unless all the House members from such districts, of either party or race, requested that their district become single member districts.

The court below also erred in holding that a major political party is constitutionally disadvantaged under the Equal Protection Clause when Appellees Bandemer's *et al.* own evidence indicated there were enough "safe" seats and "competitive" seats for the Democrats to win sixty-seven seats in the one hundred seat Indiana House of Representatives and thirty-one seats in the fifty seat Indiana Senate in 1982. The court below based its decision primarily on the fact that in 1982 the Democrats won forty-three seats while the statewide vote for all Democrat House candidates totalled 51.9% of the votes cast. Although it recognized that the Indiana General Assembly followed the guideline of not diluting the Black vote by use of its "no retrogression" rule (A-10, A-17), and by the fact that Black representation is proportional to Black population in Indiana (A-17), and that the Indiana General Assembly protected the voting rights of Blacks as Blacks as required by the Federal Constitution and the Voting Rights Act (A-21), and that there are heavy concentrations of Democrats in urban areas (A-12) that are Black (A-18), it failed to recognize that to reduce the heavy concentration of Democrat voters in urban electoral districts in Marion, Lake and Allen Counties would necessarily include in these districts Republicans (largely White), which would inevitably reduce the percentage of Black citizens in existing Democrat Black-majority districts and would necessarily cause Black vote dilution, whether single member districts or multi-member districts were used.

Although the court below found that township lines generally were followed in redistricting (A-10, A-29)

(which themselves often have irregular shapes because of natural boundaries) it severely criticized the "bizarre" shapes of certain specific House districts (A-14—A-17, A-28—A-29), while acknowledging at the same time that community of interest is often not possible (A-14, A-30). The court also failed to consider that many of these House electoral districts were designed by the House Democrats themselves (Mangus Deposition pp. 54, 57-9), were held by Democrats following the 1982 election (Exhibit JJ, p. 22), and were used in the House alternative plan presented by the Appellees Bandemer, *et al.* themselves.

The court below erred in placing the burden of proof on the State of Indiana to prove that the reapportionment acts are constitutional under the Equal Protection Clause (A-30), even though this Court has always held that the burden of proof never shifts to the defendant to prove the absence of racial discrimination in non-congressional racial voting discrimination cases. The court below therefore put a heavier burden of proof on plaintiffs in racial voting discrimination cases than on political parties seeking judicial relief under the new partisan political gerrymandering claim it has created.

The court below also erred in including the Senate reapportionment act in the sweep of its order, where there are no findings that any specific Senate district in any way violates any of the neutral criteria established by the Court; where there are no multi-member districts in the Senate; where no incumbents of the party claiming to be disadvantaged were placed in the same district with any other incumbent; and where the 1982 election resulted in proportional representation based on the statewide vote (A-214).

ARGUMENT

I.

THE DECISION BELOW IS BASED ON A NONJUSTICIABLE ISSUE IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT

In striking down Indiana's reapportionment acts solely on the basis of partisan political gerrymandering, the court below went far beyond appropriate judicial boundaries. Plunging heedlessly into the "political thicket," the court enmeshed itself in issues involving political policy devoid of judicially discoverable and manageable standards.

Prior decisions of this Court have consistently, albeit often quietly, rejected partisan political gerrymandering as a justiciable issue. In *WMCA, Inc. v. Lomenzo*, 382 U.S. 4, *affg* 238 F.Supp. 916 (S.D.N.Y. 1965) this Court affirmed in a *per curiam* opinion the holding of a three-judge court that allegations of gerrymandering "for partisan political advantage," 238 F.Supp. at 925, did not raise questions under the Federal Constitution. Justice Harlan, in a concurring opinion, observed that by its affirmance the Court affirmed the "eminently correct principle" that partisan gerrymandering is not subject to federal constitutional attack under the Fourteenth Amendment. 382 U.S. at 4.

The Court has reaffirmed that principle in many subsequent cases. See *Badgley v. Hare*, 385 U.S. 114 (1966) (dismissing an appeal of a state court decision for want of a substantial federal question); *Wells v. Rockefeller*, 398 U.S. 901, *affg* 311 F.Supp. 48 (S.D.N.Y. 1970); *Archer v. Smith*, 409 U.S. 808, *affg* *Graves v. Barnes*, 343 F.Supp. 704 (W.D. Tex. 1972); *Kelly v. Bumpers*, 413 U.S. 901 (1973), *affg* 340 F.Supp. 568 (E.D. Ark. 1972); *Wiser v. Hughes*, 459 U.S. 962 (1982) (dismissing appeals alleging political gerrymandering for want of a substantial federal question).

Lower courts, relying on these cases, have similarly concluded that political gerrymandering is not a justiciable issue. In *Cousins v. Chicago City Council*, 466 F.2d 830 (7th Cir. 1972), for example, the Seventh Circuit Court of Appeals held that a claim by a political group that it was disfavored by the drawing of ward district lines "remains among the nonjusticiable political questions," relying on *WMCA v. Lomenzo*, 382 U.S. 4 (1965). See also, e.g., *Russo v. Vacin*, 528 F.2d 27 (7th Cir. 1976); *Sincock v. Gately*, 262 F.Supp. 739, 828-33 (D. Del. 1967); *Meeks v. Avery*, 251 F.Supp. 245, 250-51 (D. Kan. 1966); *Bush v. Martin*, 251 F.Supp. 484, 513 (S.D. Tex. 1966); *Sims v. Baggett*, 247 F.Supp. 96, 104-05 (M.D. Ala. 1965).

This judicial refusal to be drawn into the issue of state political influences affecting legislative districting reflects the insoluble problems inherent in such an analysis. At a minimum, to establish a constitutional violation a court would be forced to define a protectible political class, assess the impact of district lines on that class, and inquire into the wisdom of legislative motivations and judgments. These areas of inquiry are devoid of manageable standards.

A. A Protectible Political Class Cannot Be Judicially Defined

The starting point for any protection of a political group, definition of a "politically salient class," *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2672 (1983) (Stevens, J. concurring), requires answers to numerous questions touching on the nature of political power. Some of these were expressed in the plurality opinion in *Mobile v. Bolden*, 446 U.S. 55, 78 n. 26 (1980):

It is difficult to perceive how the implications of the dissenting opinion's theory of group representation could rationally be cabined. Indeed, certain preliminary practical questions immediately come to mind: Can only members of a minority of the voting population in a particular municipality be members of

a "political group"? How large must a "group" be to be a "political group"? Can any "group" call itself a "political group"? If not, who is to say which "groups" are "political groups"? Can a qualified voter belong to more than one "political group"? Can there be more than one "political group"? Can there be more than one "political group" among white voters (e.g., Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one "political group" among nonwhite voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the size of its governing body? Upon its form of government? Upon its history? Its geographic location? The fact that even these preliminary questions may be largely unanswerable suggests some of the conceptual and practical fallacies in the constitutional theory espoused by the dissenting opinion, putting to one side the total absence of support for that theory in the Constitution itself.

Courts have avoided such unanswerable questions until now by recognizing only gerrymandering claims based upon racial considerations. Racial discrimination, of course, involves a long history of disadvantage to specific and discernable groups and is the subject of specific constitutional concern. E.g., *Whitcomb v. Chavis*, 403 U.S. 124, 180 (1972) (Douglas, J., concurring in part and dissenting in part); *United Jewish Organizations v. Carey*, 430 U.S. 144, 171 n.1 (1977) (Brennan, J., concurring); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980). No such factors are present to guide choices generally between competing political groups.

Moreover, the problem is compounded when the "groups" in question are political parties. Political parties are, after all, simply an aggregation of smaller political and special interest groups. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote*,

One Value, 1964 Sup. Ct. Rev.1, 52. Thus, inclusion of a particular political party within the definition of a "political group" requires not only that the *Mobile v. Bolden*-type questions be answered for the party as a whole, but also that the potential "political groups" comprising the party be examined to see whether they qualify for protection. Such an analysis would inevitably involve "relationships of great delicacy that are essentially political in nature." *O'Brien v. Brown*, 409 U.S. 1, 4 (1972) (per curiam). It is an analysis better left to politicians than committed to the federal judiciary.⁸

Attempts to define protectible political classes also suffer from the elusive nature of their constituencies. This Court has previously recognized that votes are cast by individual citizens, rather than economic or political interests, *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), and that such voters can change their political affiliations from election to election, *Kusper v. Pontikes*, 414 U.S. 51 (1973). Any reapportionment plan which is politically "fair" when adopted may, therefore, soon become "unfair." Changing alliances, changing views and an increasingly mobile voting populace make definition of a political group and the fixing of its geographic location an impossible task. See generally Auerbach, *Commentary*, Reapportionment in the 1970's 74, 87 (N.Polsby ed. 1971).

B. Adverse Political Impact Cannot Be Judicially Assessed

Related to the problem of defining a protectible political group is the lack of a standard for determining whether such a group has been disadvantaged. The court below purported to measure Indiana's reapportionment acts against such standards as proportional representation

⁸At least one social scientist has argued that political parties, which are by their nature "encompassing" and inclusive, are fundamentally different from political interest groups, which are exclusive in nature. M. Olson, *The Rise and Decline of Nations* 50 (1982).

(even though it recognized that proportional representation is not required, A-25), compactness and "community of interest" (although it also recognized "community of interest" is not required, A-30). The court then avoided the difficult threshold issues of measurement by asserting that the disparity in proportional representation "speaks for itself" (A-20) and that the shapes of many districts "are often contorted." (A-16) In short, the court below used a wholly subjective analysis, without standards which could guide the Indiana legislature, or any legislature, in creating an acceptable plan. This standardless approach merely reflects the lack of manageable standards available.

1. Proportionality Is Not An Effective Measure

This Court has unequivocally determined that there is no Constitutional right to proportional representation. *Mobile v. Bolden*, 446 U.S. 55, 76, 86 (1980). In any "winner take all" system certain supporters of losing candidates are arguably denied representation, but this does not deny them equal protection of the laws, even when the same candidate wins year after year. *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971). One commentator has identified several theoretical and practical "major flaws" with the use of proportionality measures for unconstitutionality. Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Minn. L. Rev. 1121, 1128 (1978). Proportionality simply cannot be guaranteed in the American system of elections, which traditionally has provided clear governing majorities and governmental stability.

Moreover, the use of a proportionality measure requires that a court match legislators either with certain types of voters or with a particular political group. In view of the range and diversity of political views among voters, even within political parties, merely labelling legislators as

"Democrat" or "Republican" is too simplistic. Such a scheme also ignores independent voters. Clearly, such matching quickly becomes complex and, further, it involves the heart of political questions reserved to voters. The only alternative to such a complex matching, however, is recognition of a right of representation for the political groups themselves, a step this Court has flatly rejected:

It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation. And the Court's decisions hold squarely that they do not.

Mobile v. Bolden, 446 U.S. 55, 78-79 (1980) (footnote omitted).

2. District Geometry Is Not An Effective Measure

Although the shapes of legislative districts, described in terms of such attributes as compactness, contiguity and community of interests, are frequently suggested as an appropriate measure of adverse political impact and were relied upon by the court below (A-14, A-27), the "tidiness" of district boundaries is an artificial measure which has been rejected by this Court.

A preference for compact and contiguous districts is really nothing but a policy decision in favor of political groups whose support is evenly distributed about a state. Those groups which are concentrated in one area, such as a city, will be disadvantaged by "stacking" if a compact district encompasses them. Groups whose "community of interest" follows some feature such as a river or an interstate highway might be "fractured" by districts meeting an ideal of compactness. Modern transportation and communication capabilities have decreased the importance of simple geometric district shapes. *Reynolds v. Sims*, 377 U.S. 533, 580 (1964).

Recognizing that other considerations are more important than geography, this Court held in *Gaffney v. Cummings*, 412 U.S. 735 (1973) that a state legislature did not violate the Fourteenth Amendment by drawing noncompact legislative districts based on partisan considerations. Simply stated, "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Id.* at 752 n. 18.

In sum, the very nature of a "political group" resists measurement of adverse impact on it by any judicially discoverable or manageable standards and involves policy questions at the heart of the political process. Accordingly, assessment of such impact as a step toward finding partisan political gerrymandering can only bury a court in the midst of an unresolvable political question.

C. Partisan Legislative Intent is Clearly a Political Question

Reapportionment is an inherently political process. *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2671 (1983) (Stevens, J., concurring). One commentator has suggested that there is nothing more political than how legislative boundaries are drawn. Polsby, *Introduction, Reapportionment in the 1970's* 1 (N.Polsby ed. 1971).

Nevertheless, only purposeful discrimination can violate the Fourteenth Amendment, *Mobile v. Bolden*, 446 U.S. 55, 67 (1980). Thus, a finding of unconstitutional political gerrymandering necessarily requires an inquiry into the partisan motives of a legislature. In addition to the difficulty of determining how much partisanship is too much, one court has suggested that "judicial intrusion so near the heart of the political process would be a desperate remedy worse than the disease." *Jimenez v. Hidalgo County Water Improvement District No. 2*, 68 F.R.D. 668, 674 (S.D. Tex. 1975), *aff'd*, 424 U.S. 950 (1976).

This Court has traditionally deferred to state legislative judgments regarding state redistricting plans. *Gaffney v.*

Cummings, 412 U.S. 735 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973); *Reynolds v. Sims*, 377 U.S. 533 (1964). Indeed, this Court has suggested that "[i]t would be idle...to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973). Certainly, it would be difficult to imagine a manageable standard involving the summoning of state legislators into a federal court to testify about their political motivations.⁹

Moreover, an attempt to isolate an "invidious" motive necessarily involves a balancing of group interests by the court in a fashion more properly left to the legislature.¹⁰ A reapportionment plan which is neutral or favorable with respect to one political group may be unfair to another. *E.g.*, *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (Hassidic Jews disadvantaged in favor of Black voters); *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2675 n. 27 (1983) (Stevens, J., concurring). Such a situation faces the Indiana legislature since the lower court's order may require that Black voters be disadvantaged to increase Democratic strength. (See A-59) In contrast to the well-developed standards for discovering invidious racial discrimination, attempts to isolate such legislative intent for political discrimination cases are doomed to failure. As Justice Brennan aptly concluded, "[p]olitical affiliation is

⁹ Not only has it "repeatedly been pointed out that it is not the business of the federal courts to inquire into the personal motives of legislators," *Baker v. Carr*, 369 U.S. 186, 337 (1962) (Harlan, J., dissenting), such an inquiry could have little or no value since no individual legislator is empowered to speak with authority for the body. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

¹⁰ This Court has suggested that a central principle of the Fourteenth Amendment is to provide "a just framework within which the diverse political groups in our society may fairly compete." *Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982) (quoting *Hunter v. Erickson*, 393 U.S. 385, 393 (1969)). Such a principle is inconsistent with judicial ranking of political groups.

the keystone of the political trade. Race, ideally, is not." *United Jewish Organizations v. Carey*, 430 U.S. 144, 171 n. 1 (1977) (Brennan, J., concurring).

II

EVEN IF A CLAIM OF PARTISAN POLITICAL GERRYMANDERING MIGHT BE JUSTICIABLE UNDER CERTAIN CIRCUMSTANCES, THIS IS NOT THAT CLAIM.

Even if a claim of partisan political gerrymandering were justiciable in some circumstances, the evidence before the court below cannot justify the court's finding that Indiana's reapportionment acts are unconstitutional on that basis. At the very least, unconstitutional political gerrymandering must create a gross disadvantage to the weaker political group. *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2672 (1983) (Stevens, J., concurring). Rather than suffering a disadvantage, however, the lower court's own findings establish that Indiana Democrats can take control of the General Assembly under the challenged reapportionment acts.

A. "Safe" and "Competitive" Seats Allow the Democrats Control

The court below held that legislative seats in the 45%-55% range are "competitive" because determined by "candidate personality and positions" (A-12) and winnable by the better candidate more "sensitive to the interests of the voters and the issues of the day" (A-11).

Indiana Senate. Based on the 1982 election results, called "most significant" by the court below (A-11), in the Indiana Senate there were 13 "safe" Democrat seats and 18 seats in the "competitive" range of 45%-55%, as shown in a chart prepared by Appellees Bandemer *et al.* (A-120). This chart also shows four "safe" and eleven "competitive" seats up for election in 1984. The 1982 election in fact resulted in proportional representation of the two political parties in the Indiana Senate, as pointed out in the opinion of Judge Pell in the court below (A-44).

Indiana House. In the Indiana House, according to a chart prepared by Appellees Bandemer *et al.* but introduced into evidence as Exhibit "HH" (A-121) by the Appellants, the 1982 election resulted in twenty-eight "safe" Democrat seats and thirty-nine "competitive" seats in the 45%-55% range. This gave the Democratic party an opportunity to win a total of sixty-seven of the one hundred House seats if they had won all "safe" and "competitive" seats.¹¹ Exhibit 32 (JA-39) is also instructive, being based on a ranking of House districts in the 1982 election results, showing the vote margins. Since the ideal House population is 54,901, a 1% increase in the Democrat vote in each House district, or 549 votes, (and the resulting Republican loss) represents a "swing" of 1,098 votes in each district. A 2% Democrat increase in votes statewide, distributed equally in each House district, would result in a "swing" of 2,196 votes in each district. Exhibit 32 indicates that a 2,196 vote swing would have elected Democrat candidate Gondeck, ranked 56th, and the other fifty-five seats with smaller Republican margins, giving the Democrats fifty-six seats in the House.¹² These statistics seem to indicate that if the Democrats are able to increase their statewide vote by two percentage points or more, with an attractive candidate for governor, there are enough competitive seats with small

¹¹ Redistricting practices are substantially different in California. See pages 52a-53a in the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed in this Court on January 30, 1985 in Cause No. 84-1226 in the case entitled *Badham, et al. v. California, et al.* The petitioners there present a chart showing that the 1984 California Congressional elections resulted in twenty-three seats with a Democrat percentage of 60% or more, seventeen seats with a Republican percentage of 60% or more, and only three seats within the 45%-55% range.

¹² Earlier, redistricting in California in the 1960's managed to produce Congressional constituencies such that a shift of as much as 15% in the popular vote in every district would have moved not a single seat from one party to the other. See Rogowski, *Representation in Political Theory and Law*, 91 Ethics 395, 426 (1981).

enough vote margins that the Democrats would sweep into control in the Indiana House.¹³

Exhibit 32 also shows that there are six heavily Republican seats that are unopposed, and six heavily Democrat seats that are also unopposed (Districts 42, 63, 74, 70 and 67), not including seats with Black members (Representatives Mosby, Goodall, Brown, and Harris) where the Indiana General Assembly recognized the need to maintain the substantial Black vote in these districts, which is also heavily Democratic.

B. Lack of Proportional Representation Based on Seat-Vote Ratios Does Not Prove Partisan Political Gerrymandering

The court below relied primarily on the fact that in the 1982 election the Democrats won forty-three seats in the House while the statewide vote for all Democrat House candidates was 51.9%, and calls this a "built in bias" (A-13) and "at the very least, a signal that Democrats may have been unfairly disadvantaged by the redistricting" (A-11—A-12).¹⁴ In fact, a lack of proportional representation between seats and votes in the House, on the record in this case, proves nothing of the sort.

Significantly, the 51.9% figure includes voting results in districts where the candidates are unopposed. This figure is reduced to 49.6% if unopposed districts are removed (JA-

¹³ Such a large number of marginal seats is unusual. A study of Congressional elections in recent years reports that the number of districts with close elections and small vote margins is decreasing rapidly. See Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 Polity 295, 301, 304 (1974).

¹⁴ This belief that the lack of proportional representation may constitute a constitutional violation, on the record in this case, is a fundamental misconception. "It is impossible to create safe districts, much less to provide proportional representation, for every race, religion and political viewpoint." Howard & Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615, 1618 (1983).

38).¹⁵ In District 51, a Black-majority district, there was only token Republican opposition and a huge Democrat margin (JA-39). With the removal of the vote totals for District 51, which required a large Democrat margin to maintain Black voting strength (vote totals shown on page 58 of Exhibit X), there are then 713,027 Republican legislative voters and 599,490 Democrat legislative voters, the Democrat vote being 45.67% of the total. This is a more meaningful percentage because it is based on 1982 House districts in which there were party contests and in which the Indiana General Assembly did not maintain overwhelmingly Democrat majorities to maintain a Black-majority district. Thus, the "signal" of unfairness relied upon by the court below was a false one.

But regardless of what is a meaningful seat-vote percentage, in comparing statewide races and legislative races the court below apparently ignored the comments of Justice Stevens in his concurring opinion in *Karcher v. Daggett*, 462 U.S. 725 (1983), wherein he stated that some "vote dilution" will inevitably result from "residential patterns" where one party is heavily concentrated in the urban areas. 103 S. Ct. at 2675 n. 27. The source cited by Justice Stevens, Backstrom, Robins & Eller, *supra* at 1127, expands on this point:

Aside from those analysts who emphasize physical appearance as a means of identifying gerrymandering, others purport to measure gerrymandering by focusing on the partisan outcome of the legislative election following a redistricting. Analysts using this approach compare the percentage of a party's legislative vote statewide with a

¹⁵ See Backstrom, Robins and Eller, *Issues in Gerrymandering: An Explanatory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Minn. L. Rev. 1121, 1128 ("Because the vote from a single uncontested race will in all probability add more to the total of the winning party than the margin by which several opposition candidates win in contested races elsewhere, the result will be a distortion in the total vote considered to reflect overall party strength.").

percentage of seats gained. Marked disparities between the two figures are said to indicate the existence of a gerrymander.

This method of identifying gerrymandering, like the first, has major flaws. First, the approach fails to account for the fact that the difference between percentage of vote and number of seats captured may in fact be the result of natural advantages—the inordinate concentration of partisans in one place—rather than any deliberate partisan districting scheme. For example, it is well known that Michigan Democrats are heavily concentrated in Detroit but are in a minority in many other parts of the state.

Thus, in every election, Detroit Democrats will win heavily but their excess votes—those above 50%—do their party no good. Similarly, Democrats in out-state Michigan waste votes in those districts where they are a strong but persistent minority. No tolerable districting plan can effectively use either kind of votes, but typical post-election bias measures would show a gerrymander in favor of Michigan Republicans.

There is no evidence or finding that any alternate plan of reapportionment in Indiana, regardless of the mapmaker, with multi-member or only single member districts, would not also reflect this "wasting" of Democratic votes in areas of high Democratic concentration, assuming that Black-majority districts were maintained.¹⁶

The lower court in *Karcher* on remand also recognized that lack of proportional representation based on statewide

¹⁶ "There is no sure way to detect gerrymandering by examining election results; the most innocent districting plan will penalize a party whose voters are either inordinately concentrated (like Michigan Democrats) or inordinately dispersed (like Missouri Republicans)." Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in *Reapportionment in the 1970's* 249, 276 (N. Polsby ed. 1971). "Large concentrations of excess votes are not always to be attributed to

(Footnote continued on following page)

votes and legislative seats won does not prove partisan political gerrymandering. The lower court held an analysis of the results in each of the proposed congressional districts of several statewide elections had no "real relevance". *Daggett v. Kimmelman*, 580 F.Supp. 1259, 1263 (1984), *aff'd sub nom Karcher v. Daggett*, ____ U.S. ____, 104 S. Ct. 2672 (1984). The court stated:

While it is true the congressional elections are frequently affected by the same issues that influence the outcome of the presidential and senatorial contests, the patent reality is that they are strongly influenced by the more direct relationship of a Representative with the voters in his own district. Thus the fact that a district may have voted in favor of a senatorial or presidential candidate of one party is hardly a strong predictor of the outcome of a congressional race.

Although this Court "has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation," *Mobile v. Bolden*, 446 U.S. 55, 79 (1980), the court below attached great significance to seat-vote ratios which do not in reality prove any cognizable disadvantage to the Democrats. Surely such evidence cannot support a finding that Indiana's reapportionment acts are unconstitutional.

(Footnote continued from preceeding page)

the deftness of the mapmakers. Many cities contain large 'natural' aggregations of Democrats and they inevitably produce top-heavy majorities for at least some of that party's candidates. While Democratic legislatures occasionally have tried to redistribute their excess votes, they seldom succeed." A. Hacker, *Congressional Districting, The Issue of Equal Representation* 56-7 (1964). See also Wildsen & Engstrom, *Spatial Distribution of Partisan Support and the Seats-Votes Relationship*, *Legislative Studies Quarterly* 3 423 (1980) (wherein the authors in developing their formula state that "the model employed highlights the importance of keeping vote dilution attributable to residential patterns conceptually distinct from dilution attributable to the placement of district boundaries, a distinction to which empirical measures of gerrymandering should be sensitive"); Grofman, *For Single-Member Districts Random is not Equal*, in *Representation and Redistricting Issues* 55-58 (B. Grofman ed. 1982).

C. The General Assembly Followed Neutral Criteria Previously Required by This Court or Recognized as Proper and Appropriate Under State Law by This Court.

1. One Man-One Vote and No Dilution Of Black Voting Strength

The court below conceded that the reapportionment acts in question followed the Constitutional criterion of "one man, one vote" with a population deviation in the range of only one percent (A-10). This is well within the ten percent limitation below which this Court has suggested no justification is required for state legislative redistricting plans. *Brown v. Thomson*, 462 U.S. 835 (1983). Absent a problem of racial discrimination, satisfaction of the equipopulation standard should end the inquiry on the record in this case. *Karcher v. Daggett*, 462 U.S. 735 (1983).

Once equipopulous districts were created, the Indiana reapportionment acts also followed the neutral criteria of no minority vote dilution and preserving Black voting strength so that the number of Black-majority districts is proportional to Black population. This was done by following the rule of "no retrogression" (A-10, A-17) which resulted in Black-majority districts proportional to Black population (A-17) despite a ten-year population loss in urban areas such as in Senate District 34 in Marion County, a Black-majority district, of 36,064 (A-123); in House District 45 (now 51) in Marion County, a Black-majority district, of 56,226 (A-124); and in House District 5 (now 14) in Lake County, a Black-majority district, of 29,592 (A-124; see also Exhibit Z, JA-63).¹⁷ The court below accordingly found no violation of the Voting Rights Act (A-21).

¹⁷ The use of the neutral criterion of not diluting Black voting strength also is evident from the reduction of the Black percentages in Old House District 5 (now 14) from 91.2% to 69.9%, in Old House District 45 (now 51) from 63.8% to 61.2%, in Senate District 3 from 84.8% to 71.9%, and in Senate District 34, from 68.1% to 58.4% (SEN 1971 "Black %", HR 1972 "Black %", SEN 1982 "Black %" and HR 1982 "Black %", A-123). A chart relating old and new district numbers is provided for the Court's convenience in an appendix to this brief.

The relative size of racial groups before and after redistricting is, of course, an important consideration in determining the constitutionality of any reapportionment act, including Indiana's. *Ketchum v. Byrne*, 740 F.2d 1398, 1407 (7th Cir. 1984). In *Rome v. United States*, 446 U.S. 156, 185 (1980) the Court held that electoral changes which lead to retrogression in the position of racial minorities in the exercise of their electoral rights cannot be permitted. See also *Beer v. United States*, 425 U.S. 130, 141 (1976).¹⁸

The sensitivity of the Indiana General Assembly to the criterion of "no minority vote dilution", recognized as a constitutional criterion in *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. at 2664 (1983), is illustrated in Marion County, which preserved its fifteen seat delegation to the Indiana House despite a population decrease (A-15). Although House District 45 (now 51) in Marion County had itself lost more population than the ideal district population size of 54,901 (A-127), the Indiana reapportionment acts preserved Black voting strength and representation and also maintained Marion County urban representation, rather than converting this Black-majority three-member district to a two-member district.

The court below seemed to recognize that the Indiana reapportionment acts followed the guideline of preserving Black voting strength, but explained this away by intimating that this was a result of "hindsight and chance" (A-18). In fact, contemporaneous newspapers articles report that this neutral criterion of "no dilution of the minority vote" guided the Indiana General Assembly throughout reapportionment. (Exhibits 241, 244, 253; Mangus Deposition Exhibits 2, 8).

Although the court below also found a "stacking" of Democrats (A-13, A-17, A-19, A-30) concentrated in urban

¹⁸ Where at large elections antedate the Voting Rights Act, their continuance does not require certification under Section 5. See Rogowski, *supra*, at 422.

areas (A-12, A-18), there was no evidence or finding that this was not the natural result of Democrats who were Black and concentrated in urban areas (A-18) being placed in the same district to preserve the Black voting strength that existed before reapportionment. This was the neutral legislative goal adhered to at all times during the reapportionment process (Bosma Deposition, pp. 20-1, 52-3, 69, JA-14; Mangus Deposition, pp. 29-31, JA-20-JA-21; Dailey Deposition, p. 91). There is no evidence or finding that any less "stacking" would not result in the Blacks losing Black voting strength and Black-majority districts in some or all of these urban areas in Indiana.

2. The "Bizarre" Shapes Condemned by the Court Below Were Needed to Meet Neutral Criteria

The decision of the court below discusses in great detail the "bizarre" shapes of certain specific House districts (A-14, A-17, A-28, A-29), but concludes only that this indicates no community of interest (A-29). Several House districts were found to lack compactness, but there is no finding that this lack of compactness resulted in gerrymandering favoring the Republicans.¹⁹ In fact, some of these House districts (District Nos. 25, 42, 43, 66, 70 and 73) were held by Democrats following the 1982 election (Exhibit JJ, p. 22). The district lines for three of these House districts held by Democrats were drawn at least in part by the Democratic Representatives themselves (Mangus Deposition, pp. 54, 57-9).

¹⁹ In Hacker, *supra* note 16 at 77, the author states "All in all, the compact and homogeneous constituency has severe drawbacks for those who live in it. Certainly, it is not clear that setting a standard of compactness would solve more gerrymandering problems than it would create, or at least perpetuate." See also Mayhew, *supra* note 16, at 273 ("Emphasizing community can also violate the compactness standard. No natural law ordains that people with community ties live in areas of regular geometric shape.").

Moreover, there is no finding that the configuration of any particular House district or districts was not in fact the result of the neutral criteria of "one man-one vote" and of not diluting Black voting strength. House districts generally follow township lines (A-29), which constitutes a legitimate state interest. *Mahan v. Howell*, 410 U.S. 315, 328 (1973), *modified* 411 U.S. 922 (1973). Compactness itself is not, of course, a federal requirement under the Constitution, *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), and was followed when the "numbers fit" (Mangus Deposition, p. 52).

3. The Least Changed Plan Was Used

The Indiana reapportionment acts then followed the neutral criterion of "least changed plan", recognized as proper by the Court. *LaComb v. Growe*, 541 F.Supp. 145 (D.Minn. 1982), *aff'd sub nom. Orwoll v. LaComb*, 546 U.S. 966 (1962). The acts preserved the cores of prior districts, *Karcher v. Daggett*, 462 U.S. 725, 103 S. Ct. 2653, 2663 (1983), and avoided where feasible contests between incumbents, *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966); *White v. Weiser*, 412 U.S. 783, 797 (1973).

4. Multi-Member Districts Were Maintained

The Indiana reapportionment acts also followed the neutral criterion of least changed plan by preserving multi-member districts in the House unless all of the Representatives from such a district, regardless of party or race, requested that their district become single-member districts (A-18; November Transcript, pp. 140-41, JA-30; Mangus Deposition pp. 20, 29, JA-20; Dailey Deposition p. 23; Campbell Deposition pp. 143-7, 151-2, 167).

The combined use of single-member districts and multi-member districts is quite common in legislatures, occurring in thirteen legislatures in 1981 (Exhibit GG, JA-71). In *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966) the

Court found it relevant that the Hawaiian Legislature was dominated by multi-member districts in both houses before statehood and that this feature did not originate with the particular reapportionment plan then under consideration. Similarly, multi-member districts have been used during this century (A-19), have had a long and continuous history in Indiana (Exhibit EE, JA-64) and were expressly found to be constitutional by this Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

Moreover, multi-member districts exist in both urban areas and rural areas and are represented by legislators that are Democrats, Republicans, or both Democrats and Republicans (A-121). For example, House District 31, a two-member district, is represented by a Republican farmer and a Democratic businessman from Gas City, Indiana (Exhibit JJ, pp. 22, 29 and 42). This negates a claim of purposeful discrimination. *Cosner v. Dalton*, 522 F.Supp. 350, 362 (E.D.Va. 1981).

While the court below relied on the "status" argument that more Blacks than Whites reside in multi-member districts (A-18), that 46.6% of the population in Marion and Allen Counties is identified as Democratic while the Republicans won 86% of the House seats in Marion and Allen Counties, all from multi-member districts, and that "such a disparity speaks for itself" (A-20), this phenomenon does not connote unconstitutionality. In *Whitcomb v. Chavis*, 403 U.S. 124 (1966), quoted approvingly in *Mobile v. Bolden*, 446 U.S. 55, 79-80, the Court considered a charge of political gerrymandering made in oral argument (403 U.S. at 156 n. 35) and held that the fifteen person multi-member district in Marion County, Indiana, was constitutional even though the minority party had won only one race in five from 1960 to 1968, *Id.* at 150. *Whitcomb* thus held it constitutional for the minority party to win exactly the same number of House seats—fifteen—in this ten year period as it would now have if it won only the three seats in Marion County in House District 51 in the next five elections.

D. The Record Does Not Show the Elements Suggested by Justice Stevens' Concurrence in *Karcher v. Daggett*

While the court below relied heavily on the concurrence of Justice Stevens in *Karcher v. Daggett*, 462 U.S. 725 (1983) for the parameters of a political gerrymandering claim (A-21), the court below made no attempt to relate the concept of "political gerrymandering" to the specific facts of this case. The Court held in *Karcher* that the plan rejected by the lower court had greater population variances, *Karcher v. Daggett*, ___ U.S. ___, 104 S.Ct. 1691 (1984) (Justice Stevens concurring in denial of stay), and "was designed to produce contests among certain Republican incumbents", *Daggett v. Kimmelman*, 580 F.Supp. 1259, 1263 (1984) *aff'd sub nom. Karcher v. Daggett*, ___ U.S. ___, 104 S.Ct. 2672 (1984). No such circumstances exist here. There is no evidence or finding by the court below that the Indiana reapportionment acts were designed to, or resulted in, contests among incumbents of either party which were not unavoidable because of one man, one vote considerations.²⁰

The court below also made no finding on the measurement of the baseline strength of a political party in Indiana. The "political group" found disadvantaged by the court below was defined as persons who are "Democrats or at least have Democratic voting tendencies" (A-19). This group was also defined as those voting for unspecified Democratic candidates in either 1956, 1958, 1964, 1972, 1974 or 1980 (A-11), as those voting for all Democratic candidates for the House of Representatives in 1982, and as those voting for all Democratic candidates for the Indiana State Senate in 1982 (A-12). As Justice Stevens recognized in his concurring opinion in *Karcher*, measurement of

²⁰ In California the 1980 Congressional reapportionment resulted in three Republican incumbents being thrown together in one Congressional district. Ayers & Whiteman, *Congressional Reapportionment in the 80's: Types and Determinates of Policy Outcomes*, 99 Political Sci. Q. 303, 306 (1984).

baseline strength is "difficult for a political party". *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2672 n. 13 (1983). The court below simply avoided this difficulty.

III

THERE IS NO BASIS IN THE RECORD FOR A FINDING OF UNCONSTITUTIONAL DISCRIMINATORY INTENT

The Court has determined that discriminatory purpose is critical to a vote-dilution claim under the Equal Protection clause of the Fourteenth Amendment. *Mobile v. Bolden*, 446 U.S. 55 (1980).²¹ Perhaps sensing the difficulty of discovering improper political intent (as opposed to racial intent) in the political process, the court below in an effort to find such intent quoted the partisan comments of two Republican legislative leaders (A-8—A-9) and found largely from these comments that the purpose and intent of the General Assembly was to deprive the minority party of its constitutional right to equal protection. There is no reason to believe, however, that these particular legislative leaders were in any way authorized to speak for the Indiana General Assembly as a whole, or that they were authorized to make these statements in any representative capacity whatever. The Court has held that no member of a legislature, outside the legislature, is empowered to speak with authority for the body. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). *Accord Strauch v. United States*, 637 F.2d 477 (7th Cir. 1980) (statements by a government official outside the scope of his authority are

²¹ Whether the early standard of *Fortson v. Dorsey*, 379 U.S. 433 (1965) which suggested non-intentional effects might violate the Fourteenth Amendment, has survived the "motive" decisions of this Court in *Washington v. Davis*, 426 U.S. 229 (1976) and *Arlington Heights v. M.H.D.C.*, 429 U.S. 252 (1977) has been recently stated to be "unclear". Rogowski, *supra*, note 12, at 420. The opinions of *Mobile*, however, leave little doubt that only intentional conduct is proscribed.

not binding); *Department of Energy v. Westland*, 565 F.2d 685, 691 (3d Cir. 1977).

Partisan comments and partisan influences are to be expected during the legislative process. In *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), the Court stated:

Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when over-laid on a census map, it requires no special genius to recognize the political consequences of drawing a district along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shapes of districts may well determine the political complexion of the area. . . . The reality is that districting inevitably has and is intended to have substantial political consequences.

Moreover, the experience in Indiana demonstrates that political partisan intentions are not always borne out by subsequent events. Before reapportionment in the 1980 election, thirty-five Republicans and fifteen Democrats were elected to the Indiana State Senate, and sixty-three Republicans and thirty-seven Democrats to the Indiana House (Exhibits II and SS). Following reapportionment, in the 1982 election there was an increase of three Democrats in the State Senate and six Democrats in the Indiana House (Exhibit JJ, p. 1).²²

²² An Indiana Democrat campaign chairman stated in 1982 that the Republicans were "piggish" in creating a large number of marginal Republican districts "that cannot withstand a good Democratic year". (Exhibit L)

IV

THE COURT BELOW IMPROPERLY SHIFTED THE BURDEN TO THE STATE OF INDIANA TO JUSTIFY ITS REAPPORTIONMENT ACTS

The court below shifted the burden of proof to the State of Indiana to prove that its reapportionment act was "necessary in order that the 'one person, one vote' constitution tenet be preserved" (A-30), which was said to be based on the concurrence of Justice Stevens in *Karcher v. Daggett*, "in conjunction with" *Mobile v. Bolden* (A-21).

In *Mobile v. Bolden*, however, the Court held the burden of proof *never* shifts to the state to prove the absence of racial discrimination. The plaintiff must always prove his case in racial voting discrimination cases, except in cases arising under Section 5 of the Voting Rights Act of 1965, not applicable here. In *Mobile*, the Court held that a plaintiff in alleging voting discrimination on account of race "must prove that the disputed plan was, conceived or operated, as [a] purposeful devic[e] to further racial. . . discrimination" 446 U.S. at 66, and noted that in *White v. Regester*, 412 U.S. 755 (1973) it held that:

the plaintiffs had been able to "produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group(s) in question".

The other case relied upon for shifting the burden of proof, *Karcher v. Daggett*, was not a Fourteenth Amendment challenge to state legislative districting at all but an Article I, Section 2 challenge to Congressional districting with an entirely different standard of proof. *Karcher* holds that as between two standards—equality or something less than equality—only the former reflects the aspirations of Article I, Section 2. 103 S.Ct. at 2659.

The burden shifted to the state in *Karcher* to justify its Congressional redistricting plan under Article I, Section 2 since an alternate plan had greater population equality.

The court below incorrectly assumed that the burden also shifted to the State of Indiana to justify its acts against a claim of political gerrymandering under the Equal Protection clause of the Fourteenth Amendment, even though the population variances in this state legislative redistricting case were *prima facie* constitutional and needed no justification, and neutral criteria recognized by this Court and even acknowledged by the court below were scrupulously followed.

Further, the House and Senate alternate plans, not offered by Appellees until 1982 after the acts had been considered and passed in 1981 (Exhibits 24, 25), could not possibly allow a presumption against the constitutionality of the Indiana reapportionment acts. They do not even purport to follow all of the same neutral criteria as the acts themselves. The impact on Black voting strength of the House or Crawford Plan is only known in fifteen of the forty districts it created. (Exhibit 215, p. 6.) The impact on Black voting strength in any of the forty-five Senate districts in the Senate or Carson Plan not listed in Exhibit 215, p. 7, is also not known. The House Plan changed multi-member districts to single member districts but used the same single member district lines in rural areas as the House reapportionment act itself (Mangus Deposition Exhibit 5) which were severely criticized by the court below (A-14—A-17, A-28—A-29). This House Plan also created unusual district shapes to maximize Black representation in Marion, Lake and Allen Counties (Exhibits 202, 207, 212, QQ and RR) that were not acceptable to or approved by the court below (A-21). The Senate Plan did not even purport to concern itself with preserving Black voting strength throughout the State of Indiana, and also created unusual shapes in Marion, Lake and Allen Counties to maximize Black representation (Exhibits 204, 209 and 214) that also were not accepted or approved by the court below. (A-21) In sum, the shift of the burden of proof to the State was without justification and was erroneous.

V

THE SCOPE OF THE REMEDY EXCEEDS THE CONSTITUTIONAL VIOLATION FOUND

The court below made no specific finding of any unconstitutionality in the Senate reapportionment act. Its opinion referred only to the House Plan as Exhibit A (A-14, A-29) and to specific House districts. There is no reference to any specific Senate district or that any such district in any way violates any of the neutral criteria established by this Court. There are no multi-member districts in the Senate.²³ No incumbents of the party claiming to be disadvantaged were placed in the same Senate district, as in *Karcher v. Daggett*. The 1982 election resulted in proportional representation of the two political parties in the Senate (A-44). In short, the court below did not find, and could not have found even under its own theory, any unconstitutional political gerrymandering in the Senate Plan. Nevertheless, the court below's remedy swept broadly over the Senate reapportionment act as well as the House reapportionment act.

As this Court held in *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971), the remedial powers of an equity court are not unlimited, and a district court errs in "broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so." See also *White v. Weiser*, 412 U.S. 783, 796-97 (1973). The State of Indiana obviously cannot correct any deficiencies in the Senate reapportionment act when none are stated to exist. Accordingly, the injunction is overbroad in its coverage of the Senate Plan and should be vacated.

²³ See Note, *Group Representation and Race Conscious Apportionment: The Roles of States and the Federal Courts*, 91 Harv. L. Rev. 1847, 1860 (1978) ("Although the Supreme Court compares projected effects of multi-member districts to the potential effects of single member districting, the Court has not recognized a right to any particular design of single member districts.")

CONCLUSION

The federal courts have long refrained from becoming entangled in standardless questions requiring political policy decisions. Throwing aside that tradition of restraint, the court below struck down Indiana's reapportionment acts on purely political grounds, even though those acts met the "one man, one vote" standard and followed other neutral criteria approved by this Court. As Justice White wisely wrote for the majority in *Gaffney v. Cummings*, 412 U.S. 735, 749-50 (1973), "[t]hat the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." For the reasons discussed herein, the Court should reverse the order of the court below and vacate the injunction.

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APPENDIX

Indiana House Districts

New House District	Old House District	Single or Multi-member
1	13	(1)
2	12	(1)
3	11	(1)
4	11	(1)
5	9	(1)
6	10	(1)
7	8	(2)
8	9	(1)
9	7	(2)
10	6	(2)
11	1	(2)
12	2	(2)
13	3	(1)
14	5	(2)
15	4	(2)
16	19	(1)
17	18	(1)
18	17	(1)
19	14	(3)
20	15	(3)
21	16	(1)
22	23	(1)
23	22	(1)
24	21	(1)
25	20	(1)
26	30	(1)
27	29	(1)
28	28	(1)
29	27	(1)
30	26	(1)
31	25	(2)
32	24	(1)
33	39	(1)

New House District	Old House District	Single or Multi-member
34	38	(1)
35	37	(1)
36	35	(1)
37	36	(1)
38	34	(1)
39	33	(1)
40	47	(1)
41	32	(1)
42	31	(1)
43	50	(1)
44	48	(1)
45	49	(1)
46		(1)
47	52	(1)
48	42	(3)
49	43	(3)
50	44	(3)
51	45	(3)
52	46	(3)
53	55	(1)
54	41	(1)
55	56	(1)
56	40	(1)
57	54	(1)
58	53	(1)
59	59	(1)
60	60	(1)
61	51	(1)
62	61	(1)
63	63	(1)
64	62	(1)
65	64	(1)
66	65	(1)

New House District	Old House District	Single or Multi-member
67	58	(1)
68	57	(1)
69	66	(1)
70	69	(1)
71	67	(1)
72	68	(1)
73	70	(1)
74	71	(1)
75	72	(2)
76	73	(1)
77		(1)

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No. 84-1244

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

SUSAN J. DAVIS, *et al.*,

Appellants,

VS.

IRWIN C. BANDEMER, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

**BRIEF OF APPELLEES INDIANA NAACP
STATE CONFERENCE OF BRANCHES**

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No. 84-1244

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OCTOBER TERM, 1985

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vs.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

**BRIEF OF APPELLEES INDIANA NAACP
STATE CONFERENCE OF BRANCHES**

I.**Proceedings Below**

Instant appellees represent black citizens of Indiana, through the NAACP States Conference of Branches, four local NAACP branches and eight named individual plaintiffs. Below, black appellees challenged the Indiana House and Senate redistricting plans, adopted in February 1982, as violating the 14th and 15th Amendment to the Constitution and Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. 1973. They submitted that the Indiana House reapportionment both impermissibly and intentionally fragmented and diluted minority voting

strength. Particularly, appellees attacked the House plan's selective use of multi-member legislative districts which submerged, to overwhelming white populations, black voters, already often fragmented by the district lines drawn by the plan's architects. Black plaintiffs claimed that the Senate plan had this same feature.

The district court agreed that black citizens of Indiana had been "hardly and harshly" treated by the House plan's use of multi-member districts. (A-18). It found "the multi-member district approach . . . particularly effective in 'stacking' blacks in large majority districts and fragmenting their population among other districts." (A-19). However, finding (a) that Indiana's black voters overwhelmingly support Democratic candidates and (b) that the dominant Republican majority intended to minimize the number of Democratic districts in the state Legislature, the district court concluded that while the challenged plans "had a significantly adverse impact upon black voters," this was "because they (blacks) characteristically align themselves with the Democratic Party, but not because of their race." (A-20-21).

The majority held that "the infirmities which reside in the 1981-82 redistricting plan arise under the Fourteenth Amendment's fundamental equal protection guarantees of fair and effective representation," not its prohibition against racial discrimination.¹ In any event, the court held that "*the relief . . . ordered below with respect to the Bandemer plaintiffs . . . accords to the NAACP plaintiffs that relief to which they are entitled under the facts herein.*" (A-21). (Emphasis added.)

¹ We note that the majority opinion below does not discuss black plaintiffs' section 2 claims nor weigh with any care the evidence adduced by black plaintiffs at trial concerning such issues as Indiana's history of racial segregation and discrimination; the closed nature of the slating process to blacks; the lack of participation by blacks in the Republican party leadership and the unresponsiveness of House and Senate Republican majorities to legislation of particular interest and concern to blacks.

While continuing to believe that the appellants violated Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments based on their racial discriminatory intent and the effects of these plans, black appellees herein chose not to cross appeal, but to defend the district court's ultimate conclusion that the challenged plans are unconstitutional in their discrimination against Democrats and blacks as Democrats.

We do so because the district court opinion, if affirmed, promises to provide blacks with relief from the needless fragmentation of population concentrations and the selective and unprincipled use of multi-member districts which further dilute minority voting strength with no governmental justification.

II.

Refutation of "Factual" Assertions in Appellants' Brief

A. Introduction

Appellants contend that the clearly intended partisan gerrymander of Indiana's State legislature—specifically designed to forward and safeguard the maximum number of "safe" Republican legislative seats—necessarily had this consequence to protect black electoral interests.

Below, black appellees show that as a factual matter this claim is entirely fanciful and fatuous.² Indeed, almost every claim in Appellants' Brief concerning the intent and

² Under the House plan, 43% of the state's black population reside in majority black districts, while the Crawford plan, *infra*, placed 59% of the black population statewide in black majority districts. (Tr. II, p. 16). For the Senate, the State's plan placed 34% of Indiana's blacks in black majority districts while the Carson plan, *infra*, placed 62.5% of blacks in majority black State senatorial districts. (Tr. II, p. 17). The notion that the challenged plans fairly treated blacks is simply without any foundation.

impact of the State's plan with regard to blacks is deceptive and unsupported by record evidence. Likewise, appellants' mischaracterize the alternative redistricting plans, offered by State Representative William Crawford (the Crawford plan) and State Senator Julia Carson (the Carson plan).

Contrary to the State's contention that it benevolently treated blacks, thereby necessarily causing injury to non-black Democrats, the Republican plans had a particularly hard and harsh impact on the aspirations of black residents of Indiana. For this reason, black representatives and Senators unanimously opposed the controverted House and Senate plans, viewing them as continuations of the disparate and unequal treatment of blacks by Indiana's overwhelmingly white Republican majority.³

Rather than serving black electoral interests, the challenged House plan first fractures minority population concentrations in Indiana's three largest urban areas—Indianapolis (Marion County); Gary (Lake County) and Ft. Wayne (Allen County). In each of these counties, the plan then employs multi-member districts, effectively and intentionally diluting minority voting strength. As the district court correctly found, 81.2% of Indiana's black population is districted into multi-member districts while only 35.2% of the state's white population is so situated. (Tr. II, p. 16, Pl's Ex. 216). The alternative, Crawford plan, supported unanimously by the legislature's black members, respected black population concentrations and utilized only single-member districts, thereby substantially reducing the dilution of black voting strength.

Likewise, the Republican's Senate plan fragmented black population concentrations in Lake and Marion Counties,

³ No black Republican serves in the House or Senate. As the district court correctly found, and as appellants concede, black voters overwhelmingly support Democratic candidates and this was known to all the legislators involved integrally in redistricting.

the only counties with sufficient black populations to elect State Senators. The controverted plan created two majority black Senatorial districts (out of fifty).

In Section B below, we demonstrate the exclusionary process by which these plans were adopted and show that the appellants' current suggestion that the principle of non-retrogression of minority vote required these plans' cited characteristics is counter-factual and, indeed, absurd. In Section C, we show that the district court's conclusion—that the multi-member districts used in the House plan serve no governmental purpose and intentionally disadvantage black and Democratic voters—is well-founded and should be affirmed. Moreover, as we argue more generally in the legal argument, III, *infra*, where multi-member districts serve no governmental purpose, i.e., the representation of counties *qua* counties in the lower legislative body, *see, Cosner v. Dalton*, 522 F. Supp. 350, 357, 362 (E.D. Va. 1981), and, instead, intentionally disadvantage specific racial and political groups, they are unconstitutional.

B. The Challenged Plans Were Heavy-Handed Republican Attempts to Insure Continued Political Hegemony, Not Efforts to Fairly Represent Black Representational Interests

(i) Legislative Process

In 1980, Indiana's Republican leadership determined to fashion a state legislative reapportionment of the greatest political advantage to their political party. (Dailey Dep. at 63); (Bosma Dep. at 96, 121). A vice chairman of the Republican State Committee worked with a political consulting firm from Detroit, Market Opinion Research, (MOR), to develop sophisticated computer programs to allow Republican map-makers to precisely carve out districts for maximum political advantage. (Sutherland Dep. at 14-15, 18-20). Statements by those directly responsible for reapportionment clearly illumine the majority's substantively partisan goal and confirm the intentionally ex-

elusionary nature of the process, by which this outcome would be assured.⁴

After developing the needed computer hardware and software with MOR, the Republican State Committee retained this firm to assist in the redistricting process. (Sutherland Dep. p. 23). Two computers were installed—one at Republican State Committee headquarters and another at space rented by the RSC. (Id. at 28, 31). MOR assembled data enabling legislative leaders and their staffs to manipulate for partisan advantage district lines. Working with Republican staff, MOR combined its sophisticated computer programs with detailed political knowledge to fashion the most partisan outcome they could put together. (A. 8, 9).

During the final two days of the 1981 legislative session, the Republicans presented their House and Senate redistricting proposals. (A-9).⁵ Contrary to the suggestion in appellants' brief, these plans were developed by an exclusively Republican conference committee not to "advance the legislative process" (Appellants' Brief at 3), but to insure that Democratic and black legislators had no access to the scheming of the Republican leadership.⁶

⁴ The Indiana legislature, Republican operatives knew, had sophisticated computers, but they chose to ignore these and work outside the legislative structure. (Sutherland Dep. pp. 21-23).

⁵ Pl's Ex. 218 shows that the Senate Bill, #80, was filed by the Reapportionment Committee on April 29, 1981 and adopted on April 30, 1981, while the Conference Report on the House Bill was filed on April 30, 1981 and voted upon by the full House the same day, the session's last under State law. (Tr. II, p. 21). Democratic legislators did not see the respective plans until they were presented on the floors of the House and Senate.

⁶ Rather disingenuously, appellants suggest that the technique of using vehicle bills to create a phony conflict between the House and Senate for the purpose of creating an exclusively partisan conference committee had been employed nine times in 1981 by Democrat O'Bannon: this argument fails for, in 1981, O'Bannon, as a member of the minority party, lacked the capacity to form a conference committee or to get a vehicle bill passed without Republican support. These powers are held by the majority party.

Having defeated an earlier Democratic-sponsored reapportionment plan which utilized only single member districts, the Republican House plan substantially fragmented black population concentrations. (A-19). However, as senior black state Representative Crawford explained at trial, "we had no opportunity to analyze the impact" before the April 30, 1981 vote. "We did not know what the maps looked like, nor what impact it might have." (Tr. II, p. 80). The Republican sponsored House and Senate plans passed along party lines, with all black representatives and Senators opposing.

After the 1981 session ended, Representative Crawford asked David Dreyer, a legislative aid, to analyze the impact of the enacted plans upon blacks. To redress the substantial dilution of black voting strength Dreyer found in both plans, Crawford and State Senator Carson introduced their alternative redistricting plans before the start of the 1982 session.⁷ Not surprisingly, a central difference between Crawford's plan and the Republican one was the latter's selective use of multi-member districts and the former's creation of 100 single member districts.⁸ By creating contiguous districts which respected black population concentrations, Crawford's plan included eight majority minority seats and Carson's had four senatorial districts in which blacks were in the majority. These plans received insubstantial legislative consideration and the Republican majority overwhelmingly defeated both. (A-19).

⁷ The legislature still had to make changes in the State's plans during the 1982 session and the blacks offered their plans as alternatives when the Republican leadership re-introduced their plans for needed changes in early 1982.

⁸ Led by Crawford, the legislature's black caucus had introduced legislation requiring single-member districts in the House since 1975. At trial, Crawford testified that, throughout the annual legislative debates on his proposal, "There was no statement made by any legislator that I can recall giving any reasons supporting multi-member districts." (Tr. II at 85). Also see corroborative testimony by Rep. Day. (Tr. II, pp. 279-280).

(ii) The House Plan Substantially Diluted Black Voting Strength

As the district court found, the use of multi-member districts both diluted and fragmented minority voting strength in Indiana.⁹ (A-19-20). Representative Crawford gave an example of the challenged plan's fragmenting effect upon blacks in Marion County:

"The area, the basic dividing line (between district 51, the majority black three-member district created by the House plan and other overwhelmingly white districts) is 38th Street. The precincts that you have identified North of 38th Street, north of the 51st district, basically with the exception of the area just to the west where it bulges out north of 38th Street, well that is the—up to about 46th Street—is predominantly black. It's the area called Butler-Tarkington, as we come further east, it becomes Meredian-Kessler, as we come further East it is the Forest Manor area. *There is no discernible distinction between blacks that live on one side of the 38th Street line or the other.* As a matter of fact, just East, around Parker, there is a subsidized low income housing complex. It used to be called the Meadows. (Emphasis added.)

Q. Where is that . . . ?

A. It would be in this area just North of the line."

(Pl's Ex. 8 with overlay of Pl's Ex. 205).

⁹ As appellant's expert Grofman explained, "You measure fragmentation in two different ways. One, you measure fragmentation with respect to the number of black districts relative to the total black population in the area. And secondly, you measure it by looking at the extent to which substantial concentrations of black population have been preserved."

"Q. And substantial black populations have been fragmented?

A. Yes."

(Tr. II, p. 269).

Mr. Dreyer also explained the fragmentation of blacks in Marion County effected by the House plan. (Tr. I, p. 182). District 51 is 61.2% black; district 49 is 21.6% black and district 51 is 3.7% black. (Tr. I, pp. 183-84).

The fragmentation and cracking of black population concentrations and the grouping of such disaggregated black populations with much more populous white areas diluted black voting strength in Indiana. In Fort Wayne—Allen County, the House created two three-member districts, numbers 19 and 20. Blacks are residentially segregated in urban Ft. Wayne. (Tr. I, p. 187). To dilute black voting strength, the House plan first split this black population concentration (which numbers about 26,000 persons) and then associated each segment with overwhelmingly white Republican population concentrations, including many persons from rural counties, sharing no known community of interest with those urban blacks. (A-16); (Pl's Ex. 200 overlaid with Pl's Ex. 201; Tr. I, pp. 180-181). Both the splitting of the black population and the creation of multi-member districts diluted black voting strength in Ft. Wayne. When combined, these independent techniques buried black political aspirations and opportunities.

Finally, in Lake County, the legislature created one two-member majority minority district, but, otherwise intentionally diluted minority voting strength. The relevant districts are: 11—4.9% black; 12—30.6% black; 13—13.3% black and 14—69.9% black. (Tr. I at 186).

The Crawford alternative avoided the fragmentation of contiguous predominantly minority precincts while firmly adhering to the one person/one vote requirement. In Marion County, rather than one three-member majority black district, Crawford's plan created four black majority single member districts—87—55.7% black; 88—66.7% black; 89—65.6% black and 94—62% black. (Tr. I at 190-191, Pl's ex. 207). In Allen County, rather than fashioning

two three-member districts,¹⁰ 19 and 20, each less than 12% black in composition, Crawford proposed six single-member districts including #50, 40.2% black, encompassing all of urban Fort Wayne.

Finally, in Lake County (Gary), rather than four two-member and one single-member district, the Crawford alternative offered nine single-member districts and minimized the dilution of the minority vote:

<i>House Plan</i>		<i>Crawford Alternative</i>	
11	4.9% black	48	70.9% black
12	30.6% black ¹¹	49	64.6% black
14	69.9% black ¹¹	31	57.5% black
		15	54.2% black

In summary, the House plan created two majority-minority districts—#51 (with three seats) in Marion County and #14 (with two seats) in Lake County. Redressing the House plan's egregious and needless fragmentation of black voting strength, the Crawford plan created 8 majority-minority districts, four in Marion and four in Lake Counties. Comparing these plans, it is obvious that the Crawford plan preserves black voting strength far more fairly than does the House plan, which intentionally minimizes black voting strength.

¹⁰ The five triple member districts in Marion County and the two in and around Allen County are the House plan's only three-member districts. These districts cross county lines, while the Crawford plan's treatment of the same major counties avoids this consequence.

¹¹ These two districts are two-members in the House plan.

(iii) **The Appellants' Defenses of the Racial Dilution Effected by Their Redistricting Plan Are Baseless**

Defending the House plan, appellants repeatedly assert that it provides blacks proportional representation.¹² But, as the district court correctly concluded, appellants' suggestion that blacks have achieved "proportional representation" under the challenged House plan "seems to represent hindsight and chance—an argument asserted after the accidental fact of proportional representation." (A-17-18). In fact, at their depositions, taken before the 1982 elections which produced six black House members and one white elected from the majority black district in Marion County, no Republican legislator mentioned any concern for insuring blacks proportional representation nor any commitment to this outcome.

In 1982, blacks won six seats in the House when in one majority-white district, #12, two whites ran against a single black in the general election, splitting the majority white vote and allowing the black, Harris, to squeak into office. And one black representative, Hurley Goodall, was elected from an overwhelmingly white district, the first time that had happened in the State. As Craig Campbell, the chief Republican staff person on the House redistricting testified, "The plan that we adopted did, in fact, increase the number of minority seats, *but I certainly would not have projected or planned that that would happen.*" (Emphasis added.)

"Q. Exactly, when you created a 30% black district in Lake County, you didn't project that Mr. Harris would win in a three way race, right?

A. Correct."

¹² Black plaintiffs did not argue for proportional representation, either in the legislature or at trial. Instead, they asserted that where blacks are residentially segregated and live in contiguous precincts, any redistricting plan should not needlessly fragment such population concentrations, thereby reducing the chance of the minority gaining substantial expression in the State House and Senate.

(iv) The State Senate Plan Likewise Minimized Black Political Strength

In the Senate, the Republicans created two majority black seats, one in Lake and one in Marion County. In so doing, the Senate replicated the fragmentation of black neighborhoods perpetrated in the House plan.

The Carson alternative proposed four majority black districts—two each in Marion and Lake Counties. Ms. Carson's plan avoided fragmenting black precincts as "there are no majority (minority) precincts outside of these . . . districts." (Tr. II, pp. 4-14; PP's Exs. 200, 205, 208, 209, 210, 214). As Mr. Dreyer explained, in drawing these four districts, he did not cross any kind of political sub-division line not traversed by the Senate's own plan. (*Id.* at 13).

(v) The Alternative Plans Far Better Recognize Black Communities of Interest

In trying to show that the Crawford and Carson alternatives were worthy of the short shrift they received in the House and Senate, appellants raise a number of rather ludicrous arguments: first, they state that they cannot tell, nor can a reviewing court, whether the alternative plans serve black electoral interests better than do the challenged plans because the alternatives only re-drew district lines for the three most populous counties—Marion, Allen and Lake. This suggestion is preposterous. Appellants are apprised that these are the only counties where substantial black population exists and where the issue of vote dilution of blacks has any importance. In these counties, the alternative plans, as demonstrated above, far better protect black population concentrations from needless fragmentation than do either the House or Senate plan. To raise the suggestion that the Republican plans better served blacks elsewhere in the State is meritless, as elsewhere in Indiana blacks do not have sufficient population concentrations to make this an issue.

(vi) "Retrogression" Is Not the Applicable Legal Standard to Measure the Permissibility of the Challenged Plans

More importantly, the district court found that one articulated criteria in the redistricting process was "no retrogression." This finding does not indicate (a) that the legislators understood what retrogression is; (b) that retrogression was the appropriate legal standard for assessing the plans in question or (c) the achievement of non-retrogression, assuming the Republicans could meet this standard, and that it applied, required the rather bizarre shapes chosen by the plans' architects or the selective use of multi-member districts which, as shown above, minimize minority voting strength.

Throughout this litigation, the appellants have refused to recognize that the principle of *non-dilution* of minority voting strength requires the consideration, in any legislative redistricting effort, of alternative plans or methods to determine whether a proposed fragmentation of black voting strength is necessary to the achievement of other cardinal redistricting principles and goals. Minority voters cannot be fragmented and their votes diluted before unimportant or less weighty principles. *See*, Grofman (appellants' expert) (Tr. II, p. 265).

Indeed, Indiana's Republican map-makers admitted to not having seriously considered the impact of a single member districting alternative on black voting strength. (Campbell) (Tr. II, pp. 176-177, 180-181). Instead of approaching redistricting with a recognition of the importance of non-dilution, yet adhering admittedly to the recognition of communities of interests, the Republicans have elevated the principle of non-retrogression—they assert that so long as they create as much (or as little) representational opportunities for blacks as the former plan provided they have met all applicable legal standards—regardless of the existence of practical alternatives which better respect black population concentrations and fully satisfy *Baker v. Carr*, *infra*, standards.

This test, however, is not the law. Non-retrogression is an insufficient safeguard against the perpetuation of dilution, which can be judged best by a comparison of the challenged plan with preferred alternatives which, assertedly, minimize dilution while respecting other first principles.

Critically here, partisan intent, not non-retrogression, informed the use of multi-member districts in Marion, Lake and Allen Counties, Pl's Ex. 230. As legislators testified at their depositions, they did not seriously examine single member districting plans to determine whether same could achieve less dilution and fragmentation of black population.

(vii) "Non-Retrogression" Did Not Require the Political Gerrymander in Marion County

Appellants suggest that the legislative decision to create or retain 15 House seats dominated by Marion County related, somehow, to the implementation of the non-retrogression principle. This claim is totally unsupported by, indeed, it is contrary to, the record. Republican legislators admit that maintaining these 15 seats in five three-member districts, allowed their party to keep "safe" control over 12 of them.

As the Crawford map demonstrates, Marion County had a 1980 population sufficient to support 13.8 House seats, not 15. (A-15, n. 1). The County could have been re-districted into 14 seats, without the needless and injurious crossing of county lines. At the same time, *four* majority black districts could have been formed. This alternative conclusively shows that dilution could have been *avoided* entirely without the use of multi-member districts or the traversing of county lines. Appellants' contention (Brief at 28-29) that adhering to the non-retrogression principle somehow entailed the politically motivated maintenance of 15 legislative seats for Marion County is simply baseless and dishonest.

(viii) Shifting Black Population in Urban Areas Does Not Excuse the House Plan's Racial Dilution

Finally, the Republicans suggest that changes in the patterns of black population concentration made quite difficult the retention of even three majority black seats in Marion County or two in Lake County and that only their sincere commitment to non-retrogression impelled the Republican majority to maintain the previous number of black majority districts. In support of this contention, appellants show that black population substantially decreased in the former (1972) black-majority districts.

Again, appellants' contention is frivolous. Black population migrated into northeast Marion County during the 1970's. Blacks left neighborhoods once constitutive of the core urban ghetto, increasing substantially the minority populations of contiguous, formerly white areas. Grofman (Tr. II, p. 261); Campbell (Tr. II, pp. 175-176). However, while its epicenter shifted, black population *remained* heavily segregated and concentrated *within* Marion County.

The consequence of this shift for the possibility of black majority districts is best measured by the Crawford and Carson plans' ability, fully complying with other cardinal redistricting principles, to create four majority House districts and two majority black senatorial districts in Marion County and a like number in Lake County, concerning which appellants advance the same baseless demographic claim: That these districts could be formed, subsuming all black population concentrations, entirely refutes appellants' argument that black mobility made more difficult the creation of black majority districts or, put another way, made necessary the kind of fragmentation of black population concentrations evident in the House and Senate plans, *Accord, Major v. Treen*, 574 F. Supp. 325 (D.La. 1983), or the partisan gerrymander engineered by the majority.

In short, appellants' contention that they had to harm non-black Democrats to protect blacks is belied both by the

extremely negative effects of their plan upon blacks and the beneficial consequences for minority voting strength of the Carson and Crawford plans, both of which received strong Democratic Party support.

C. The House Plan Used Multi-Member Districts Without the Semblance of a Governmental Purpose

As described above, the Indiana House plan selectively used multi-member districts—in some urban areas and not in others;¹³ in some locales where such districts had been in use previously and not in others;¹⁴ in some areas where doing so required combining very rural townships with highly urbanized areas from a different county.¹⁵

The district court correctly found that the use of multi-member districts in Indiana served no “governmental purpose,” as that term has been used in prior cases before this Court. *Pl.’s Ex. 232*; *Sutherline Dep.* pp. 79-82; 86-87; *Campbell Dep.* pp. 35-92; *Dailey Dep.* pp. 22, 29; *Zimmer v. McKeithen*, 485 F. 2d 1297 (5th Cir. 1973); *cf. Whitcomb v. Chavis*, 402 U.S. 363 (1972) (county *qua* county represented through the use of multi-member districts).

Contrary to their suggestion that “the combined use of single districts and multi-member districts is quite common in legislatures occurring in 13 states in 1981,” appellants’ own expert conceded (a) that for state legislatures, multi-member districts are increasingly uncommon and (b) that after the 1980 round of redistricting, only six states used a majority of multi-member districts along with a majority of single member districts, as did Indiana. *Grofman (Tr. II, pp. 258-260)*.

¹³ For instance, in Elkhart; Evansville and South Bend, multi-member districts were discontinued in the 1981 House plan.

¹⁴ State Exhibit EE shows this very checkered and erratic history.

¹⁵ Examples include districts 7, 19, 20 and 75.

Each Indiana state legislator who played a substantial role in structuring the challenged House plan, as well as their staffs, were asked at depositions to provide explanations and rationales for each multi-member district. No rationale (except the forwarding of partisan advantage),¹⁶ was adduced, other than an occasional “that’s the way the district was.” When asked whether they had made any inquiry as to why a multi-member district had been used originally or for how long the particular multi-member district had been in use, the legislators and their staffs invariably did not have any idea. (*Campbell, Tr. II, pp. 172-173*). Appellants’ expert had “no knowledge” of the purpose for which the State House used multi-member districts. *Grofman (Tr. II, p. 259)*.

With respect to the impact of multi-member districts upon blacks in Allen and Marion Counties, Magnus, the Chair of the House Reapportionment Committee, knew of no community of interests furthered by the combination of Allen County’s predominantly urban area (once itself divided in half) with the rural communities to the North and South. (A-16). Magnus stated that he had been to Fort Wayne once at 2:00 A.M.; that he “guessed” that the townships in adjacent counties which he had connected up with the city were “rural”; that he had no idea whether the blacks divided by the House plan lived contiguous to one another and was ignorant as to the racial impact of the plan. Likewise, when asked similar questions concerning the racial impact of the multi-member districts in Marion County, Campbell, the chief House staff member, admitted that the question of whether electoral districts which less fragmented blacks could have been drawn was an “empirical” one and that he had never drawn single member districts to determine the possibilities of that structure.

¹⁶ With regard to district Nos. 9 (*Dailey Dep.* pp. 37-38); 10 (*Dailey Dep.* pp. 38-39); 19 and 20 (*Mangus Dep.* 86 and *Dailey Dep.* p. 52); 48-52 (*Mangus Dep.* p. 92; *Dailey Dep.* 63, 31-32, 34), the architects of the House plan expressly conceded partisan motivation in the use of the multi-member district.

Appellants defend multi-member districts on the ground that they forwarded the "neutral criterion" of "least change plan." In the same breadth, appellants state that, where incumbents agreed, the House leadership converted former multi-member districts into single member districts. This weak justification for multi-member districts cannot survive their discriminatory partisan and racial impact.

Nowhere have appellants suggested why multi-member districts are used or should be used in Indiana. Nowhere have appellants articulated any governmental purpose forwarded by them. Moreover, the ease by which incumbent legislators could convert these districts to single member districts substantially undermines any suggestion that the legislature was committed, in principle, to the concept of "least change plan." Campbell (Tr. II, p. 174) (on change of district 11 from multi-member to single member district). Even if the principle of adherence to least change plan had more substantial basis here, as appellants' expert conceded, this concept is "certainly not" a principle which weighs as heavily as non-dilution of minority voting strength. (Tr. II, p. 270).

Against this weak rationale, appellees suggest that multi-member districts group unlike constituencies; dilute minority voting strength; reduce legislative accountability and diminish the effectiveness of these legislators given broader geographic territory and more people to service. Republican architects of the House plan, *themselves all from single-member districts*, agreed with these criticisms of multi-member districts in Indiana. Mangus Dep. at 79-80; Sutherland, Dep. at 159.

The absence of a substantial state purpose or policy in support of multi-member districts, when combined with the discriminatory impact caused by them, strongly points to their unconstitutionality, as found by the district court. *Major, supra*, at 352.

III.

Under Current Constitutional Standards, Indiana Intentionally Discriminated Against Blacks in Adopting the Challenged Redistricting Plans

In light of the foregoing analysis which demonstrates the disadvantages to black voters as a group of multi-member districts and the lack of governmental justification for them, black appellees submit that the continued use of multi-member districts violates the Equal Protection Clause of the Fourteenth Amendment.¹⁷

Below we show first that voting is a fundamental right, not only for individuals, but for protected racial groups, as groups; that blacks are such a protected class due to the nation's legacy of slavery and racial discrimination and that where, as here, the fundamental rights of a protected class are minimized or cancelled out, a State must provide compelling bases for the challenged action. *Gaffney v. Cummings*, 421 U.S. 751 (1975). Since Indiana has adduced no rational, let alone compelling, basis for its use of multi-member districts, its House plan should be held unconstitutional under the Equal Protection Clause.

We next submit that under the standards set out in *Arlington Heights v. Metro Housing Center*,¹⁸ 429 U.S. 252 (1976), Indiana's exclusionary enactment of redistricting plans which (a) selectively use multi-member districts and (b) fragment minority population concentrations while

¹⁷ The district court found the challenged plans violated the "fair and effective representation" clause of the 14th Amendment in part due to the use of multi-member districts. We support its conclusion that, as used, multi-member districts are unconstitutional though, as is shown below, we submit that this conclusion is correct for different reasons.

¹⁸ In *Rogers v. Lodge*, 458 U.S. 613, 618 (1982), the Supreme Court expressly recognized the applicability of *Arlington Heights* analysis in voting rights cases.

claiming adherence to communities of interest in drawing district lines, was racially discriminatory and, thus, a violation of the Fourteenth Amendment.¹⁹ This argument forms yet another independent basis of support for the district court's ultimate conclusion that the House and Senate plans are unconstitutional under the Fourteenth Amendment.

A. Voting Is a Fundamental Right and the Deprivation or Minimization of the Right to Effectively Vote, Particularly Against Members of a Protected Group, Requires a Compelling Basis

As this Court reaffirmed earlier this Term, *Hunter v. Underwood*, 53 L.W. 4468 (4/16/85), the right to vote is fundamental to our democratic system of self-government. *Harper v. Va. Board of Elections*, 383 U.S. 663, 667 (1966), *Yick Wo v. Hopkins*, 118 U.S. 370 (1886). ("Though not regarded as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless, it is conceded a fundamental political right, because preservative of all rights.")

The Fourteenth Amendment requires equality of weight for each voter. *Baker v. Carr*, 369 U.S. 186 (1962). This principle applies to Congressional districting and, with slightly less stringency, to State legislative and municipal apportionment as well.

And, this Court has recognized that gerrymanders, intended to diminish or cancel out a racial or political group's electoral strength, may be unconstitutional. *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 (1977); *Chapman v. Meier*, 420 U.S. 1, 19 (1975); *White v. Regester*, 412 U.S.

¹⁹ In understanding this claim, it is critical to note that *wherever* blacks were sufficiently populous to form House districts, multi-member districts were used.

755, 765 (1973);²⁰ Note, *At-Large Elections*, 41 Albany Law Review, 363, 370 (1977) ("True responsiveness remains a fiction and minority voting nothing more than an exercise in futility if a voting scheme prevents the collective voice from effectively making known its needs within the democratic political process. One person's vote, though it be the absolute equal of another's cannot alone preserve anything but the status quo. Only with a collective voice can civil rights be preserved.")

Since individuals are able to achieve political goals through groups and as politics is an ongoing struggle between competing groups, courts must safeguard the political arena against gerrymanders which threatens to fence out or substantially diminish the electoral possibilities of discrete and insular minorities. *Rogers v. Lodge*, *supra.*, at 1019; *Fortson v. Dorsey*, 379 U.S. 433 (1965). Where plaintiffs adduce substantial proof that a redistricting plan selectively employs devices which effectively dilute the voting rights of a protected minority, courts have required the plan's advocates to justify its use of such techniques by reference to neutral principles. *Cosner v. Dalton*, *supra.*; *Busbee v. Smith*, 549 F. Supp. 494, 517 (D.D.C. 1982) ("... the absence of a legitimate, non-racial reason for a voting change is probative of discriminatory purpose, particularly if the factors usually considered by the decision-

²⁰ As opposed to the claims made in these cases and in the instant case, *Whitcomb v. Chavis*, 402 U.S. 363 (1972), did not involve an alleged gerrymander, but rather the claimed effect on black voters of a plan which created 15 at-large House seats for Marion County. Plaintiffs in *Whitcomb* specifically acknowledged that their claim did *not* involve an assertion that the plan's framers intended to discriminate against blacks. Moreover, plaintiffs failed to prove that whites elected at-large in the County were generally unresponsive to black political, social or economic interests. On the contrary, black appellees argued below that the current plan intentionally diluted black voting strength and that the House delegates from Marion County have been terribly unresponsive to black interests.

maker strongly favors a decision contrary to the one reached.")²¹

Where a legislature exclusively uses multi-member districts in the districting of its lower House, no suspicion arises that this technique has been chosen to harm one group or another. This is so because, though multi-member districts may inherently submerge minorities, their *consistent* use may be justified by reference to arguments and purposes generally and positively associated with multi-member districts, i.e., their assistance in focusing voters on broad issues of importance to the entire community or their role in developing identification with a political subdivision, rather than with its components.²²

However, where multi-member districts are selectively employed, particularly where the vast majority of a lower house's districts are single-members, suspicion naturally arises as to the legislature's reasons for using multi-member districts at all. And, if, as in Indiana, further inquiry demonstrates that such districts have been used to disadvantage all substantial concentrations of minority voters, the state has the burden to explain why it chose this pattern of redistricting.²³

In this setting, the State cannot adduce "general" reasons to justify its selective use of multi-member districts.

²¹ At the same time as proscribing the intentional dilution of the voting rights of protected groups, the court has never endorsed the concept of proportional representation for such groups. *City of Mobile v. Bolden*, 446 U.S. 55, 78-79 (plurality opinion of Stewart, J.); at 86 (Stevens, J., concurring); *Chapman v. Meier*, *supra*.

²² In such cases of exclusive and general use, multi-member districts could still be challenged as intentionally diluting minority voting strength, but the State could assert at least a rational bases for their use.

²³ This burden should be particularly heavy where multi-member districts are combined with the fragmentation of black population concentrations, itself an independent violation of Section 2. *Busbee v. Smith*, *supra*.

Cosner, supra. For, if such reasons had actual currency, or in fact, had motivated it, the legislature could not explain the infrequency of its employ of such districts.²⁴ In other words, resort to general representational rationales, as parroted by appellants, for the selective use of multi-member districts, must fail.

Instead, the state will have to show the specific circumstances which occasion and justify each instance of multi-member districting. "In evaluating equal protection challenges to districting plans, just as in resolving such attacks on other forms of discriminatory action, I would consider whether the plan has an adverse impact on an identifiable political group, whether the plan has objective indicia of irregularity, and thus, whether the State is able to produce convincing evidence that the plan nevertheless serves neutral, legitimate interests of the community as a whole." *Karcher v. Daggett*, 102 S.Ct. 2653, 2670 (1984) (Stevens, J., concurring).

The nature of the State's evidence must not be general, but must differentiate the specific areas where it used multi-member districts from the many more numerous occasions when it did not. Put another way, "A tenuous state policy supportive of a particular districting scheme is probative on the question of the fairness or unfairness of that scheme's impact on black voters." *Major v. Treen*, *supra*, at 352.

In Indiana, the state could not articulate any convincing explanation for the "pattern" of its House redistricting plan. The district court's finding in this regard is amply supported on the record. Moreover, the plan's Republican architects admitted that they represented single-member districts; believed that such districts afforded greater ac-

²⁴ "Substantive departures too may be relevant (to a finding of intentional discrimination), if the factors usually considered important by decision-makers strongly favor a decision contrary to the one reached." *Arlington Heights*, *supra*.

countability to voters and had made no effort during the 1981-82 redistricting process to convert *their* single-member districts to multi-members. This only confirms the general preference for such districts shown most clearly by the number of single-member districts (61) in the plan and makes even more acute the state's unmet obligation to justify its selective use of multi-member districts.

At least implicitly, the majority party understood the need to make such a particularized argument in defense of multi-member districts. At trial, House staff member Campbell testified that the high costs of media buys in urban areas justified the creation of multi-member districts. Unfortunately for this suggested rationale for multi-member districts, the record discloses that no candidate for State Senator from Lake or Marion Counties has ever employed television ads. Moreover, those who testified on the question of campaign costs, whether Republican or Democratic, stated that campaigning in multi-member districts is much more costly than in single-member districts.

Appellants also assert that the criteria of "least change plan" justifies the continued use of multi-member districts in urban areas. But, as discussed fully above, adherence in the House plan to this principle was, itself, quite imperfect. Throughout the redistricting, Republican leaders stood prepared to dismantle multi-member districts at the request of their incumbents. Finally, the specific multi-districts created in Marion and Lake Counties made substantial changes from pre-existing districts.

In short, the State has provided no rational, let alone compelling, basis for its very selective use of multi-member districts. Dismantling these districts and their replacement by a fair plan, which does not dilute black electoral strength, would likely cause a loss to the Republican party of several seats in the House. But while motivating the creation and maintenance of such districts, this possibility hardly affords a compelling governmental justification for

a plan which treats black voters differently from white voters, substantially submerging the formers' group voting strength as well as the value of the ballot to black voters. And where only such a partisan loss measures the nature of the 'state interest', the Constitution cannot permit this differential treatment of black as opposed to white voters. Indeed, adherence to the state's redistricting principles, i.e. respect for communities of interest compels the elimination of the selectively used multi-member districts.

B. Application of Arlington Heights Standards Supports the District Court's Conclusion

Above, we have shown that as voting is a fundamental right and blacks a protected class, the use of gerrymanders which disadvantage blacks as a group must meet a standard of compelling or at least substantial state or governmental interest. Indiana fails whichever standard applies and its House and Senate redistricting plans are unconstitutional under the Equal Protection clause of the Fourteenth Amendment.

A second form of Fourteenth Amendment analysis supports the same ultimate conclusion. Courts have increasingly recognized the importance of evaluating both the process of legislative enactment or administrative decision-making as well as the substantive standards embodied in legislation or administrative action in judging the constitutionality of actions which disproportionately disadvantage and unequally treat blacks. *Hunter, supra*, at 4469; *Arlington Heights, supra*, at 266-267. Holding government to a standard of regularity serves to insure the consistent application of substantive principles as between groups through settled procedures. On the other hand, divergence from either procedural norms or generally applied rules of decision, where same disadvantages racial minorities, raises considerable suspicion of discrimination.

While the first constitutional argument does not focus on intentionality, but rather weighs the nature of the right

in question and the group disadvantaged by the challenged state action against the magnitude of the state interest, the second focuses directly, if often only by inference, upon legislative intent.

Here, the disproportionate impact of the use of multi-member districts (81% of Indiana's blacks are grouped in multi-member districts against 35% of the State's white persons), when combined with both procedural and substantive departures from generally applied procedures and principles, supports the conclusion that Indiana's legislature harbored racially discriminatory intent. The closed nature of the redistricting process precluded participation by black members of the General Assembly. The short shrift the Republican majority gave to alternative districting proposals, as developed by black legislative leadership, belies any legislative intent to fairly and deliberatively consider serious alternatives and indicates, instead, a pre-determination to reject proposals deemed favorable by and to racial minorities. Finally, the last minute presentation of the majority plans confirms that those in charge sacrificed any semblance of procedural fairness before the twin altars of racial and partisan advantage. *Major v. Treen, supra*.

Likewise, while using single member districts in the vast majority of districts, the House employed multi-member legislative districts in every area of substantial black population concentration. Simultaneously, the House architects converted several other cities from multi-member to single-member districts.

In addition, while the both Senate and House plans group geographic areas based on community of interests, both needlessly fragment black population concentrations which share strong communities of interest, further contributing to the submersion of black political strength. *Busbee, supra*, at 501; *Major, supra*, at 335.

Combining these results with the depicted legislative history proves that the State legislature harbored discriminatory intent sufficient to support the district court's declaration that the challenged plans are unconstitutional. As Justice Stevens wrote in *Karcher, supra*,

[Where] a state is unable to respond to a plaintiff's prima facie case by showing that its plan is supported by adequate neutral criteria . . . a court could properly conclude that the challenged scheme is either totally irrational or entirely motivated by a desire to curtail the political strength of the affected political group.

Application of this standard to the claim of black appellees in Indiana supports the conclusion that the State has intentionally discriminated against them and that the district court's declaration of unconstitutionality should be affirmed.

CONCLUSION

For the foregoing reasons, the district court's opinion finding Indiana's 1981-82 State redistricting unconstitutional should be affirmed.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,
Appellants,
v.

IRWIN C. BANDEMER, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana

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QUESTION

Whether the court below correctly ruled that the Indiana law apportioning the state for purposes of electing its bicameral state legislature violates the equal protection clause of the fourteenth amendment where that law: (1) was designed to and does preclude voters of one political party from electing a majority of the legislature irrespective of that party's performance at the polls; (2) mixes single-member and multimember districts for the purpose of concentrating the vote of the minority party in some areas and diluting it in others; (3) is replete with highly irregular configurations, lacks compactness, ignores traditional political subdivisions and reflects no concern for communities of interest; (4) was adopted through a legislative process which wholly excluded one of the major political parties and the public; and (5) is without rational basis or neutral criteria.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

 No. 84-1244

SUSAN J. DAVIS, *et al.*,
 v. *Appellants*,

IRWIN C. BANDEMER, *et al.*,
Appellees.

On Appeal from the United States District Court
 for the Southern District of Indiana

BRIEF OF APPELLEES

**PARTIES, OPINIONS BELOW AND
 JURISDICTION OF THIS COURT**

The opinion of the three-judge federal district court is reported at 603 F. Supp. 1479 (1984). With that exception, although appellees ("plaintiffs") do not agree with all aspects of appellants' ("defendants") statement of this Court's jurisdiction and the identities of the parties, they regard the discrepancies as immaterial and therefore accept defendants' version for these purposes.

STATEMENT OF THE CASE

A. Indiana's Legislature

The state legislature or "General Assembly" in Indiana consists of a 100-member House of Representatives and a 50-member Senate. Representatives are elected to

two-year terms. Senators are elected to four-year terms. Senators' terms are staggered so that only twenty-five Senate seats are subject to election in any general election (A-5).¹ The General Assembly is not a full-time legislature (A-5). In odd-numbered years (following a general election), the General Assembly meets in a "regular session" consisting of no more than 61 session days and concluding by April 30 (A-6). In even-numbered years the General Assembly meets for up to 30 session days concluding by March 15. The Governor may call the General Assembly into special session (A-6). Indiana has no mechanism for referendum or initiative. Adoption of any such procedure would require constitutional amendment that in turn requires adoption by both houses of the General Assembly in two consecutive legislatures. IND. CONST. art. 16, § 1.

Legislative process in each house is controlled by the political party holding a majority of seats in that house. The ability of a party to find expression for its views in legislative action is drastically affected by its status as majority or minority in the legislature. The majority party in the House of Representatives elects the speaker, who in turn exercises absolute control over the committee to which bills are assigned and whether a bill will ever reach the floor (A-6). In Indiana, a speaker wishing to prevent a piece of legislation from becoming law may simply refuse to "hand it down" as a matter of unfettered discretion (A-6). This unreviewable veto power gives the speaker the power to bargain for affirmative votes on any issue. Similarly, the majority party

¹ Citations to "A - ——" refer to the Appendix to defendants' Jurisdictional Statement. "JA- ——" refers to the Joint Appendix. "Oct. R. ——" and "Nov. R. ——" refer to the pages of the separately paginated transcripts of the proceedings below held on October 12, 1983, and November 16, 1983, respectively. Pursuant to Rule 34.5, in the case of exhibits, these references are to the transcript pages where the exhibits were offered and admitted.

elects the floor leaders in both houses who control the flow of legislation, the assignment of members to committees, and the appointment of committee chairs (A-6).

B. Indiana's Politics

Indiana is a "swing state"; neither overwhelmingly Democratic or Republican (A-11). The best measure of a party's "baseline" or normalized strength in any given area are the races for "anonymous" statewide offices.² In Indiana the clerk or reporter of the state appellate courts was on the statewide ballot each year through 1982. As a practical matter, elections for these offices (and state auditor and treasurer) are simply reflections of party vote because these races present no policy issue or controversy. Indeed, very few voters even know the names of the candidates.

In recent years in which neither party scored landslide victories in Indiana or nationally (1976 and 1982), the Republican candidates for the clerk or reporter received 51.0% and 50.8% of the statewide vote for the two major parties (Pl. Ex. 30; JA-37).³ In the best Democratic years (1974 and 1958), the Republican totals declined to 44.3% and 44.6%, and in the best Republican years (1980 and 1972), the Republican totals were 56.1% and 57.4% (Pl. Ex. 30; JA-37). Although there is a small third-party vote for statewide offices, there is no significant third-party vote for legislative seats (Def. Exs. W and X; Nov. R. 126 and 127). Because the Senate is elected for staggered terms (one-half stands every two years), victories in consecutive elections are neces-

² Plaintiffs' expert so testified (JA-26) and defendants' expert agreed (Nov. R. 243). The theoretical basis for this is set forth in Backstrom, Robins & Eller, *Issues In Gerrymandering: An Exploratory Measure Of Partisan Gerrymandering Applied To Minnesota*, 62 Minn. L. Rev. 1121 (1978).

³ All of plaintiffs' statistical exhibits (Pl. Exs. 26 through 52) were offered and admitted into evidence at Oct. R. 70.

sary for a party to gain control of the General Assembly and change the districting for future elections. A party that can insulate itself from swings of 6% to 7% from the norm can effectively perpetuate its control of the legislature. In the particular circumstances before the Court, if the incumbent Republican majority can retain a majority of the seats despite a 56% vote for the opposition, it withstands the Democratic high water mark. The record includes basic Indiana election results since 1954 (Pl. Ex. 30; JA-37). It reveals no two consecutive elections in which the same party attained 55% of the statewide vote.

Indiana has a strong tradition of adherence to party lines. It has not seen widespread crossover voting. As a result, individual candidates deviate from party line votes less than in some states (Nov. R. 244). Indeed, in some counties the voting machines are set to require a vote for all candidates of a party to open the machine. To vote only for president, the voter must throw the party lever then push up each of the dozens of other individual levers.

C. Apportionment in Indiana Before 1981

Article 4, Section 5 of the Constitution of the State of Indiana requires that at the first session of the General Assembly after each census, the number of senators and representatives is to be fixed by law and apportioned among the several counties (A-5). From at least 1879 through 1971 Indiana's apportionment laws allocated House and Senate seats among its 92 counties (or groups of counties).⁴ If a county was entitled to more than one seat, all seats were elected at large from the county. Smaller counties were grouped and elected one seat from the group. Because Marion County (Indianapolis) alone since 1965 represented a 15 House seat swing for one

⁴ See Wallace, *Legislative Apportionment In Indiana: A Case History*, 42 Ind. L. J. 6, App. J-1 to W-1 (1966).

party or the other, the result of this system was that the party that carried Marion County became the majority party. The pattern of apportionment by counties changed in 1971 when, in response to the district court's decision in *Whitcomb v. Chavis*, the General Assembly adopted a reapportionment plan for the House employing only single-member districts. *Whitcomb v. Chavis*, 403 U.S. 124, 128 n.1 (1971). No election occurred under that plan, however, because a second plan employing a mix of single and multimember districts was adopted by the General Assembly in 1972 after this Court's reversal of the district court's decision. 1972 Ind. Code, § 2-1-1.2-3.

D. The 1981 Reapportionment

The first General Assembly after the 1980 census convened on November 18, 1980. As a result of the 1980 national Republican landslide, the Republicans enjoyed a substantial majority in both houses of the General Assembly. The reapportionment process began in February when "vehicle" bills were introduced in the two houses by members of the Republican leadership (A-7). The bills were without substantive content and contained no description of any legislative district (A-7; Pl. Exs. 55 and 56; Oct. R. 117, 118 and 119).

Each of these bills was passed in its respective chamber and then sent to the other chamber where each was amended by making wholly insignificant changes (A-7). The sole purpose for this contrived legislative process was to cause the two bills, still devoid of content but no longer identical to the versions passed in the first house, to be referred to a conference committee (A-7). All four of the members of the conference committee were Republicans.⁵

⁵ Four Democrats were appointed as nonvoting "advisors" to the committee, but not a single senator or representative of the minority party was appointed as a conferee (A-7).

Only after the empty bills had been assigned to the all majority conference committee did the process of giving the bills substance begin. This work was done by a few members of the Republican leadership and their staff in an office rented for them by the Republican State Committee (A-8). The major tool used in this process was a computer system provided by a Detroit, Michigan, computer firm, Market Opinion Research ("MOR") (A-7) and a data base for use in that system that included the political complexion of each voting unit in the State based upon recent election returns (A-26; Sutherlin Dep. 17; Schneider Dep. Exs. 104-107; Oct. R. 29-30). MOR's services were obtained, not by the state legislature, but by the Republican State Committee at a cost of \$250,000 (A-8).

The members of the legislative minority and the public were totally excluded from the map-drawing process (A-8). They did not have access to the computer equipment, programs or data; nor were they given the opportunity to view any preliminary maps. The State Legislative Services Agency, a bipartisan agency available to legislators to assist them in drafting legislation, had a computer capable of performing the same operations, but did not have the political data base used by MOR. According to the majority leader in the Senate, the Legislative Services Agency was not used for the specific reason that "partisan activity was strictly prohibited on the part of the (Agency's) employees" (Bosma Dep. 163; R. 29-30). Similarly, at no time during the two and one-half month period it was reapportioning the State did the majority leadership afford the citizens of Indiana any meaningful opportunity to comment on any proposed maps (A-8). Finally, in the last week of the legislative session, the conference committee unveiled for the first time the majority's plan for new legislative districts (A-8). The disclosure of the contents of the heretofore empty bills was the first time anyone other than the

Republican legislators or party officials had an opportunity to view these enormously complex plans. The minority had only 40 hours between the time the bills were released and the time they were adopted to review the districting of more than 4,000 precincts (A-9).

On the final day of the 1981 regular session, after limited floor debate, the Senate and House adopted the conference report, voting along party lines (A-9). During the 1982 legislative session, technical revisions were made in the bills in order to correct a number of errors; these included the omission of some precincts from any districts and one district whose boundary did not close (A-9).

E. The Resulting Maps

1. **Districts of Various Sizes.** The apportionment plan adopted in 1981 ("the Plan") created 77 House districts: 7 triple-member districts, 9 double-member districts and 61 single-member districts. In Marion County, which had 15 seats under the prior plan, parts of two surrounding counties were added in order to create a population base sufficient to support 15 seats. These 15 seats were distributed among five triple-member districts, each highly irregular in shape.⁶

The political makeup of the five districts into which Marion County and the added surrounding areas were divided produced a 12 to 3 majority for the Republicans (Def. Ex. X; Nov. R. 126, 127). This was accomplished by concentrating the Democratic core vote in one triple-member district and slicing off enough of the surround-

⁶ The details of the districts are too finely drawn to be accurately depicted in a document the size of this brief. Plaintiffs' exhibit 12 is a map of Marion County showing the House district lines in black. This and other maps in evidence were not included in the record initially sent to the Court by the district court clerk but were subsequently forwarded to this Court. All of the maps used by plaintiffs at trial (Pl. Exs. 1 through 22) were identified, offered and admitted in evidence at Oct. R. 33-48.

ing Democratic vote into each of the four surrounding areas to create four inevitably Republican triple-member districts (A-15 and 30). If Marion County were divided into single-member districts on any reasonably compact and contiguous scheme, the likely result would be the addition of two or three seats that would be favorable to the Democrats.⁷

In contrast to the Plan's concentration of Democratic voters in central Indianapolis, in Fort Wayne the Plan employed 3-member districts to divide the Democratic vote essentially down the middle. By patching areas from several surrounding counties onto Allen County, which includes the city of Fort Wayne, the Plan created two triple-member districts, each overwhelmingly Republican. This was done notwithstanding the fact that the city of Fort Wayne (population 172,196 (Pl. Ex. 23; Oct. R. 44 and 48)) has a Democratic mayor and would itself be entitled to over three seats in the Indiana House.

The triple-member districts were not employed consistently in metropolitan areas, however. In Lake County, the second most populous county in Indiana, there are no triple-member districts.⁸ Rather, a combination of double and single-member districts resulted. And in the state's fourth and fifth most populous counties, Vander-

⁷ Schematic displays of the districts in and around Marion and Allen Counties appear in the Appendix to this brief. The political makeup of these areas can be seen from an inspection of plaintiffs' exhibits 7 (Marion) and 13 (Allen) which are color coded to reflect the baseline Democratic and Republican votes in various areas of these counties. The detail of the parts of the districts inside these counties appears in overlays as plaintiffs' exhibits 8 and 9 (Marion) and 14 and 15 (Allen).

⁸ Lake County's House and Senate districts are shown on plaintiffs' exhibit 19. Lake County's Democratic core vote is in the northwest corner of the state. As a result, the scheme used in Marion and Allen counties (patching suburban areas onto the Democratic core) was not feasible within the state boundaries.

burgh⁹ (which includes the city of Evansville) and St. Joseph (which includes the city of South Bend), again combinations of double and single-member districts appeared (Pl. Ex. 1; Pl. Ex. 50; JA-54). In all three cases the districts included areas outside these counties notwithstanding the fact that in both Vanderburgh and St. Joseph, either the county itself (Vanderburgh) or well-recognized units within the county (the city of South Bend and Portage Township in St. Joseph County), had populations that were integral multiples of a numerically perfect district. Double-member districts (House districts 9, 10 and 31) appear outside the major metropolitan areas (Pl. Ex. 1). And some of the larger cities (Muncie, Anderson, Terre Haute) have only single-member districts (Pl. Ex. 49; JA-53).

2. County Lines and Other Independently Meaningful Lines. The Senate plan, though employing all single-member districts, paid no regard whatever to the State constitutional mandate that "no county for Senatorial apportionment, shall ever be divided."¹⁰ It was long ago established that if this constitutional mandate must be bent to yield to population equality, it should be ignored only to the extent necessary to preserve proportionate representation. *Denney v. State*, 144 Ind. 503, 42 N.E. 929 (1896). The Senate districts created by the Plan divided Indiana's 92 counties 73 times (Pl. Ex. 48; JA-52). This was far more than necessary to meet the requirements of equal population (A-28), far more than the previous apportionment which divided counties only 59 times (Pl. Ex. 47), and far more than an alternate map presented to the General Assembly which divided counties only 38 times (Pl. Ex. 48; JA-52).

⁹ Vanderburgh County's House and Senate districts are shown on plaintiffs' exhibit 22.

¹⁰ At the time the Plan was adopted Art. 4, § 6 of the Indiana Constitution so provided. The Constitution was amended in 1984 to eliminate this provision.

The 1980 census revealed a statewide population of 5,490,179 resulting in a perfect House district of 54,902 and a perfect Senate district of 109,804 (Pl. Ex. 23; Oct. R. 44 and 48). As a result, Indiana has a number of natural modules for the construction of any legislative map. These include Marion County (which is the same as the city of Indianapolis). Its population was 765,233 or a nearly perfect 14 House and 7 Senate seats (*Id.*). The city of South Bend (109,727, two House and one Senate seats), Vanderburgh County which contains the city of Evansville, (167,515, three House seats), LaPorte County (108,632, two House seats), St. Joseph Township in Allen County (55,381, one House seat), and Jeffersonville Township in Clark County (55,831, one House seat) are other examples (*Id.*). Not a single one of these obvious districts was constituted as either one or more self-contained single districts or a multimember district. Instead, every one, like every other district in the state, was divided up and patched onto other areas to create the map that emerged.

3. Nesting. The Senate districts bear no relationship to the House districts. Despite the fact that Indiana's General Assembly consists of 50 senators and 100 representatives not a single Senate district consists of two House districts (Pl. Ex. 4). Indiana has ten seats in Congress. No Congressional district is composed of either ten House or five Senate districts.

4. District Shapes. The shapes of some of these districts are described by the district court (A-14, 15, 16, 27, 28 and 29). They can be fairly characterized as enjoying no basis in natural geography, political boundaries, community of interest or any other factor. And no justification was offered in the district court for these configurations. The lines routinely deviate from well established and recognized landmarks such as major streets, township lines, political subdivisions, school dis-

tricts and towns with the result that most voters do not know in what district they reside.¹¹

5. Relationship to Past Practices. The Plan deviated wholly from Indiana's historical practice of allocating seats among counties or groups of counties. Prior to 1972, each apportionment plan, including the one involved in *Whitcomb v. Chavis*, elected at-large delegations from various counties, including Marion, in proportion to their population. Because Marion County elected 15% of the entire General Assembly and was potentially winnable by either party, the effect of this approach was to permit either party to sweep Marion County and thereby gain control of the legislature.¹² The 1981 Plan eliminated this possibility by creating five triple-member districts giving the minority three certain seats but precluding any greater representation.

6. Factors Relevant to Understanding Indiana's Map. Indiana has no significant geographic limitations. As a part of the Northwest Territory it is laid out by town-

¹¹ Some of the shapes of rural districts appear at pages 18 and 19 of the Motion To Affirm. As will be seen, they include many bottlenecks, projections and indentations. The urban districts are sufficiently irregular that their shapes cannot be viewed except on larger maps (Pl. Exs. 12, 16, 19 and 22).

¹² Jewell, *The Consequences of Single- and Multimember Districting*, in REPRESENTATION AND REDISTRICTING ISSUES 129, 131 (B. Grofman, A. Lijphart, B. McKay and H. Scarrow eds. 1982). Defendants observe that under the 1960 plan Democrats won 15 of 75 seats up for election in the 5 general elections of that decade. Under the Plan, Democrats can be expected to win 3 of 15 seats in each of five elections for a total of 15 seats for the decade (Def. Br. 31). The difference of course is that in the 1960s, the 15 were won all at once (1964) and gave the Democrats control of the legislature. *Whitcomb v. Chavis*, 403 U.S. at 134 n.11. This illustrates the effect of large multimember districts observed in *Whitcomb v. Chavis*, to submerge individual candidates and reduce all races to baseline party strength.

ship and range in squares. With the exception of the Ohio River on the south and the Wabash River on a part of the Illinois border, there is no irregular shape at all in its boundaries (Pl. Exs. 1-6). There are no significant bodies of water or mountains that could reasonably affect the configuration of any political districting. Indeed, most counties and townships are essentially square as are all of the counties discussed in the foregoing description except Vanderburgh which has the Ohio River as its southern boundary.¹³ Finally, in most rural areas, the minimal voting unit is the township, which is usually a square or rectangle (Pl. Ex. 6). Because any district must be composed of voting units, township lines, and therefore superficially regular lines, necessarily appear in some parts of the state as district boundaries.¹⁴ Nonetheless, virtually no district in the entire state is regular in shape. Even in wholly rural areas, projections, indentations and bottlenecks are commonplace.

F. The Political Impact of the Plan

1. **Measured by the Parties' Baseline Support.** The baseline statewide party vote, eliminating the effects of any particular candidate or issue, is 51.2% Republican and 48.8% Democratic over the past thirty years' elections (Pl. Ex. 30; JA-37).¹⁵ In November 1982, a general

¹³ A map (Pl. Ex. 51) displaying the county lines appears at JA-57. The significance of the other materials on the map appearing at JA-57 is explained in note 27 *infra*.

¹⁴ It is presumably this phenomenon to which defendants refer when they state, incorrectly and free of record reference, that House districts generally follow township lines (Def. Br. 30). That claims certainly not true of urban areas. See Pl. Exs. 7, 8 and 9 (Marion County), 19 (Lake County), 13, 14 and 15 (Allen County) and 22 (Vanderburgh County).

¹⁵ The method of measuring baseline vote is explained at p. 3 *supra*. The average (mean) of the baseline results in 1976 and 1982, the two years in recent electoral history that were neither heavily Republican nor heavily Democratic, was 50.9% Republican

election was held under the Plan. That election turned out to be a normal year, virtually a dead heat between the two major parties statewide. Of the three statewide races for anonymous offices (auditor, treasurer and court clerk), two Republicans and one Democrat were victorious. Each of the six candidates received between 48.9% and 51.1% of the statewide vote (Pl. Ex. 31; JA-38). The Democratic baseline vote was 50.009%, or approximately 1.2% better than the Democrats' historical average of 48.8%.

Judged by the 1982 baseline party vote, the effect of the Plan in the House was to create 62 Republican seats and 38 Democratic seats (Pl. Ex. 36; JA-47). The Senate seats are 30 Republican and 20 Democratic (Pl. Ex. 39; JA-50). The result in the seven triple-member districts in and around Marion and Allen Counties was 18 seats that were from 55.6% to 63.6% Republican and 3 that were 84% Democratic (Pl. Ex. 35; JA-45 and 46).

2. **The Actual 1982 Election Results.** Democratic candidates for the Indiana House received 51.9% of all votes cast statewide for House races (Pl. Ex. 31; JA-38). Nevertheless, only 43 Democrats were elected to the 100-member House of Representatives. Notwithstanding a slightly Democratic year, the Democratic vote in the 51st most Democratic House district was only 44.4% (Pl. Ex. 32; JA-39), 5.6% shy of the amount needed to unseat the majority. In the triple-member districts in and around Marion and Allen Counties, Democratic candi-

to 49.1% Democratic. If all years since 1954 are averaged, the result is essentially the same at 51.2% and 48.8%. The dissent below concluded that the statewide vote was 53.2% Republican (A-45). This conclusion is based on a plainly faulty methodology. It averages only 1980 (a Republican landslide) and 1982 (a normal year). This is no more appropriate than averaging 1974 (a Democratic landslide) and 1976 (a normal year) to conclude that Indiana was 52.35% Democratic in 1978 (Pl. Ex. 30; JA-37).

dates for the House of Representatives received 46.3% of the vote, but won only 3 of 21 seats (Def. Ex. X; R. 126, 127).

In the Senate, of the 25 seats up for election, 13 were favorable to Democrats and 12 favorable to Republicans (Pl. Ex. 39; JA-50). As would be expected because 1982 was a normal year, the results of the 1982 elections were the same as these statistics (13 Democrats elected to 12 Republicans) (Pl. Ex. 33; JA-41), although not precisely the same seats were carried by the respective parties as the baseline vote would indicate. Presumably for reasons having to do with individual races, two Republican senators won in races favorable to the Democrats and vice versa.¹⁶ Of the remaining 25 seats not up for election until 1984, 18 were favorable to Republicans (Pl. Ex. 39; JA-50). If the 1984 election produced the same Democratic vote as 1982, only seven more Democrats would be expected to win for a total of 20 Democratic senators (Pl. Ex. 39; JA-50).¹⁷ Thus, under the Plan, consecutive elections with a 50% Democratic vote would result in a Senate which is only 40% Democratic.

G. Defendants' "Facts"

Defendants' "statement of the case" contains a number of matters that plaintiffs view as either pure argument or incorrect or misleadingly incomplete. Defendants also attempt to defend the contrived legislative process they employed by advancing a variety of claims that plaintiffs

¹⁶ This is to be expected. Baseline figures are offered to show the bias inherent in a district and in a statewide plan, not to predict the result in any district. The strength of a given candidate, at least in a single-member district can overcome significant handicaps. But statewide, as a matter of random distribution, these effects tend to neutralize each other as they in fact did in the 1982 (and 1984) Senate races.

¹⁷ In fact, in the 1984 election seven Democrats were elected.

submit are both irrelevant and not grounded in facts or the record.¹⁸

Defendants include in their statement of the case the contention that "the General Assembly followed certain neutral criteria in adopting the Indiana reapportionment acts in 1981" (Def. Br. 6). But the district court found that "the present plan is without a rational basis in neutral criteria" (A-32). The court found that the majority party adhered to the "unavoidable constitutional consideration" of "one person, one vote" (A-17), but could find no evidence "that the district lines as they exist are necessary in order that the 'one person, one vote' constitu-

¹⁸ First, defendants contend that "vehicle bills are used by the legislative leadership of both parties" (Def. Br. 4). Defendants' sole support for this claim is an exhibit (Def. Ex. Y; R. 126, 127) showing that during the 1981-82 legislative session the Senate minority leader introduced nine bills designated as "vehicle bills." But the exhibit gives no indication as to whether, as is usually the case, the bills gained content in the normal committee process before action by either house. Nor does it reveal any parallel empty vehicles proceeding simultaneously through the House in order to throw empty bills into a single party conference committee as happened in this extraordinary case.

Defendants also argue that because a few changes were made in the plan reported by the conference committee the legislative process was in fact open (Def. Br. 5). Defendants' "facts" do not support their proposition. Of the 127 legislative districts, the majority's leaders could recall only four instances of accommodations made to the minority party. These accommodations were both few in number and of no significance to the overall effect of the plan.

Lastly, defendants use the statement of the case to argue that their actions were consistent with the rules of legislative procedure and "were substantially the same as the procedures followed in previous years" (Def. Br. 6). Whether the actions of the majority were in technical compliance with legislative rules created and adopted by them is beside the point. Whether similar procedures had or had not been followed in the past is also irrelevant. But, more to the point, the record is devoid of any testimony or exhibits substantiating defendants' claim.

tional tenet be preserved" (A-30). And, of course, there is no such evidence. The district court also characterized defendants' argument that the reapportionment plan was the result of the application of a "no retrogression" or "proportionality" policy with regard to black voters as representing "hindsight and chance—an argument asserted after the accidental fact of proportional representation" (A-17 and 18). Plaintiffs submit that a review of the Plan shows it enjoys no justification whatever, and defendants cite none other than their own conclusory assertions. The district court found that the majority party was "most notably" motivated by a desire "to insulate itself from risk of losing control of the General Assembly," and had "no apparent concern for either 'community of interest' or compactness" (A-17). In short, defendants continue to assert as fact contentions rejected by the trial court and without foundation in the evidence or in persuasive reasoning.

SUMMARY OF ARGUMENT

The 1981 Indiana apportionment Plan is a law of the State of Indiana. The Plan denies equal protection of the laws to identifiable groups of individuals. This is true regardless of whether proof of the legislature's intent to harm the group is required or whether the law is judged by objective criteria. Under either standard, and under conventional equal protection doctrines, the Plan fails. Both logic and precedent compel the conclusion that political affiliation cannot constitutionally be penalized as the Plan seeks to do.

Because the Plan can be analyzed in conventional equal protection terms, the claims are justiciable. Moreover, under this Court's precedents, notably *Baker v. Carr*, the claims are justiciable.

The Plan contains population deviations from the optimum district of over 2% (over 4% from high to low) without any justification. The lines for each house ad-

here neither to established political or other subdivisions, to any identifiable community of interest nor even to lines for the other house. Multimember districts are used arbitrarily and solely for political advantage. In short, the Plan is an example of the equipopulous gerrymander made possible by modern technology and predicted by this Court and knowledgeable political scientists as a threat to representative government equal to or greater than population deviations. To reverse the district court in this case and on this record is to overrule *Reynolds v. Sims* for all practical purposes.

Resolution of this case involves application of recognized judicial doctrines and can be accomplished by significant objective standards that do not embroil the courts in continuous review of nuances or debatable judgments.

ARGUMENT

I. THE 1981 INDIANA APPORTIONMENT PLAN VIOLATES BASIC PRINCIPLES OF EQUAL PROTECTION

Under well established principles of constitutional law an equal protection violation occurs to the extent that a statute either intentionally disadvantages a class of citizens or creates a legislative classification of citizens that does not advance a legitimate state interest. The Indiana reapportionment law fails under either analysis.

The fourteenth amendment provides that no state may "deny to any person within its jurisdiction the equal protection of its laws." Of course, no construction of the equal protection clause can "take from the States all powers of classification," since in one or more respects, "[m]ost laws classify." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-272 (1979). But the equal protection clause does establish the fundamental requirement that under any legislative classification, ex-

plicit or implied, "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). The bottom line of the equal protection mandate is the "fundamental principle" that "the State must govern impartially." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979).

A state denies equal protection under its laws to a group of residents or citizens if it acts in either of two fundamental ways. First, a statute, even if neutral on its face, violates the equal protection requirement when it has been passed with the intent to discriminate or facilitate discrimination among citizen groups and has that effect. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Where such discriminatory intent is charged, the courts customarily move from the "important starting point" of the impact of the legislation in question and proceed to assess intent in light of the historical background of the statute, the specific sequence of events leading to its passage, procedural and substantive departures from decisionmaking norms and other aspects of the legislative and administrative history. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-268 (1977). Legislative history becomes especially relevant "where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 268. In the event that such a "blend of history and an intensely local appraisal of the design and impact" of the statute in question reveal a discriminatory design, the principles of equal protection require that the statute must be struck down. *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (quoting *White v. Regester*, 412 U.S. 755, 769-770 (1973)); *Hunter v. Erickson*, 393 U.S. 385 (1969). As shown in Part III *infra*, the Indiana laws fail this test.

The equal protection guarantee imposes not only a primary "intent" test but also a second "rational action" test. Legislation must "proceed upon a rational basis" without "resort to a classification that is palpably arbitrary." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959). Though legislation may escape the rigors of an exact science, there can be no constitutional excuse for any classification or division of citizens that is "wholly without any rational basis." *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973); *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966). To be deemed rational, even under less than strict scrutiny, a legislative classification must "serve important governmental objectives" and be "substantially related to achievement of those objectives."¹⁹ *Craig v. Boren*, 429 U.S. 190, 197 (1976); *sée also Mills v. Habluetzel*, 456 U.S. 91, 99 (1982); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980); *Jimenez v. Weinberger*, 417 U.S. 628 (1974). As shown in Part IV *infra*, the 1981 Indiana Plan imposes a wholly irrational classification of voters and is sustained by no legitimate governmental objective.

¹⁹ Although no "strict scrutiny" is necessary to invalidate the 1981 Indiana apportionment, laws affecting voting are among those which receive this highest degree of equal protection attention, because the franchise is "the guardian of all other rights." *Plyler v. Doe*, 457 U.S. at 217 n.15. Where the right to vote is infringed, or, as in this case, rendered ineffective, there is no longer a basis for the Constitution's generally optimistic presumption "that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Consequently, any law having "a real and appreciable impact on the exercise of the franchise" must be "closely scrutinized" and found reasonably necessary to the accomplishment of legitimate state objectives." *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (quoting *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966)); *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Yick Wo v. Hopkins*, 118 U.S. at 370.

II. THE COURT BELOW CORRECTLY DECIDED THAT PLAINTIFFS' CLAIMS ARE JUSTICIABLE

Defendants simply never address the fundamental equal protection doctrines outlined above. Because one test of justiciability is susceptibility to analysis in conventional judicial doctrines, this itself is fatal to defendants' claim of nonjusticiability. But defendants and the amici supporting them fail even on their own terms. First, they argue that this Court has already held that any claim of partisan political gerrymandering is not justiciable. This argument is simply wrong. Second, they argue that any claim of partisan political gerrymandering should be held to be nonjusticiable because it would involve "political questions" best left beyond judicial intervention. This argument is based on a complete misapprehension of the political question doctrine and is flatly at odds with *Baker v. Carr*, 369 U.S. 186 (1962), the leading case on the "political question" branch of justiciability and the controlling case here.

A. Prior Teachings of this Court Support Judicial Resolution of Plaintiffs' Claims

Defendants rely on this Court's summary rulings in a handful of prior apportionment cases to support their claim that the Court has "rejected partisan political gerrymandering as a justiciable issue" (Def. Br. 13). Defendants' contention is flawed for three reasons. First, it misperceives the significance of a dismissal or affirmance.

A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not, as we have continued to stress, . . . necessarily reflect our agreement with the opinion of the court whose judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action.

Washington v. Confederated Bands and Tribes, 439 U.S. 463, 476 n.20 (1979); see also *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 308 n.1 (1976); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976). The fact that the Court "affirm[s] the judgment but not necessarily the reasoning by which it was reached" (*Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)), is significant here because in two of the cases cited by defendants the lower court found that the plaintiffs had failed to prove the alleged gerrymander even if the claim was justiciable. See, e.g., *Wells v. Rockefeller*, 311 F. Supp. 48, 53 (S.D.N.Y. 1970); *Kelly v. Bumpers*, 340 F. Supp. 568, 580 (E.D. Ark. 1972).

Secondly, the summary affirmances relied on by defendants do not do the job. None involves jurisdictional statements concerning (1) the use of different sized districts to disadvantage the opposition party, (2) express statements of invidious intent by the authors of the plan, (3) an absence of nesting, or (4) state legislative districts drawn without regard for political subdivision boundaries.²⁰

Most importantly, defendants' argument simply ignores numerous recent statements by this Court supporting the justiciability of the claims presented here. In *Whitcomb*

²⁰ Summary affirmances reject only the specific questions presented in the jurisdictional statement. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Defendants' reliance on decisions by federal courts of appeal and district courts is likewise unpersuasive. *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916 (S.D.N.Y. 1965), for example, is premised on an incorrect reading of this Court's opinion in *Fortson v. Dorsey*, 379 U.S. 433 (1964). The district court in *WMCA* believed *Fortson* ". . . makes it clear that the Supreme Court has refrained from condemning partisan gerrymandering as unconstitutional." 238 F. Supp. at 926. As indicated at p. 22 and n.34, the Court made no such finding. To the extent the Seventh Circuit's opinion in *Cousins v. Chicago City Council*, 466 F.2d 830 (7th Cir. 1972), suggests that a claim of gerrymandering is a nonjusticiable political question that opinion was clearly modified by *Russo v. Vacin*, 528

v. Chavis, 403 U.S. at 143, this Court explicitly stated that "we have deemed the validity of multimember district systems justiciable." And defendants' review of applicable case law omits to mention *Fortson v. Dorsey*, 379 U.S. 433 (1965). The Court there expressly recognized that political gerrymandering may give rise to a justiciable constitutional claim:

It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements in the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. This question, however, is not presented by the record before us.

379 U.S. at 439 (emphasis added).

In the years after *Fortson*, this Court has repeatedly recognized that "a districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed to 'minimize or cancel out the voting strength of racial or political elements of the voting population'". *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (quoting *Fortson*); *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Whitcomb v. Chavis*, 403 U.S. at 143; *Chapman v. Meier*, 420 U.S. 1, 17 (1975); *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 167 (1977) (italicizing "racial or political groups"); see also *Abate v. Mundt*, 403 U.S. 182, 185-86 (1971) (noting that the Court has "underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political groups"). That is the precise factual situation presented

F.2d 27, 30 (7th Cir. 1976). There the circuit court, in keeping with the opinions of this Court, emphasized that "redistricting . . . for political purposes is not wholly exempt from judicial scrutiny."

by this case. As the district court found and as elaborated below, the majority party in Indiana through the use of multimember districts stacked or split concentrations of Democratic voters to minimize their electoral power (A-30). And Justice Rehnquist, joined by the Chief Justice, recently observed that at least in the context of multimember districts, vote dilution is a meaningful and presumably justiciable concept. *Mississippi Republican Executive Committee v. Brooks*, — U.S. —, 105 S.Ct. 416, 422 (1984).

Recently a majority of the members of this Court appeared to recognize that gerrymandering may be justiciable beyond the discriminatory use of multimember districts. In *Karcher v. Daggett*, 462 U.S. 725 (1983), a plurality of the Court ruled that New Jersey's plan for congressional districting failed to limit population variances among districts to those which were unavoidable. The plurality opinion did not address plaintiffs' alternative claim that the plan constituted an actionable political gerrymander. However, Justice Stevens, in a concurring opinion, stated that "political gerrymandering is one species of 'vote dilution' that is proscribed by the Equal Protection Clause." 462 U.S. at 744. In a separate dissent, Justice Powell stated "I also believe that the injuries that arise from gerrymandering may rise to constitutional dimensions." *Id.* at 787. Justice Powell too was "prepared to entertain constitutional challenges to partisan gerrymandering that reach the level of discrimination described by JUSTICE STEVENS." *Id.* Furthermore, Justice White in a dissent joined by the Chief Justice and Justices Powell and Rehnquist after noting that the gerrymander was "a far greater potential threat to the equality of representation," restated the point that "neither the rule of absolute equality nor one of substantial equality can alone prevent deliberate partisan gerrymandering." *Id.* at 776 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 555 (1969) (White, J., dissenting)).

B. Defendants' Argument Was Rejected 20 Years Ago in *Baker v. Carr*

Defendants' claim that this case presents a non-justiciable political question has a familiar ring. It is virtually the same argument presented to this Court in *Baker v. Carr*, 369 U.S. 186 (1962).²¹ The argument, rejected 23 years ago, deserves no better fate today.

Baker v. Carr teaches that "the nonjusticiability of a political question is primarily a function of the separation of powers." 369 U.S. at 210. Just because a case involves the protection of political rights, or may be labeled a political case, does not mean that the wrong has no judicial remedy. The issue of justiciability must be determined by an examination of the facts of the particular case presented. In the words of the Court:

²¹ Plaintiffs in *Baker v. Carr* challenged the apportioning of the State of Tennessee for purposes of electing representatives to the state assembly. The voting districts of Tennessee, like those of most states, had not been changed in several decades notwithstanding dramatic shifts in the size and location of the state's population. Plaintiffs alleged that the apportionment violated the equal protection clause because it disadvantaged voters in heavily populated (urban) districts by virtue of the "debasement of their votes." 369 U.S. at 187-188. The district court, believing that the case presented a "question of the distribution of political strength for legislative purposes" dismissed the plaintiffs' claim at least in part because it believed the claim raised a nonjusticiable political question. This Court reversed, holding:

We understand the District Court to have read [*Colegrove v. Green*] compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question" and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable "political question." . . .

. . . .
 . . . Appellants' claim that they are being denied equal protection is justiciable, and if "discrimination is sufficiently shown, the right of relief under the Equal Protection Clause is not diminished by the fact that the discrimination relates to political rights."

Id. at 209-10 (citation omitted).

Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry.

Id. at 210-11.

The doctrine of which we treat is one of "political questions" not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging.

Id. at 217.

After analyzing past cases and summarizing the "elements which identify it as essentially a function of separation of powers", 369 U.S. at 217, the Court resoundingly rejected arguments of nonjusticiability strikingly similar to those presented here:

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has

been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

Id. at 226 (footnote omitted).

For all these reasons, defendants' nonjusticiability argument fails here. Although this case clearly involves infringement of political rights, it involves no political question. There is no question presented here as to the actions of another branch of the federal government and no risk of uncertainty or inconsistency in the treatment of the same question by various governmental departments.

C. Defendants' and Amici's Arguments Are Misplaced on this Record

Defendants and amici seek to raise a number of issues that are not presented in this case. Moreover, contrary to defendants' and amici's hypothetical and hyperbolic arguments, resolution of this case does not require the Court to make any determination in the absence of judicially manageable standards. When the record here is examined, the alleged difficulties proposed in the abstract by defendants and amici simply disappear. Contrary to defendants' argument that "a protectible political class cannot be judicially defined" (Def. Br. 14-16), the record here demonstrates that plaintiffs, the Democratic voters in Indiana, are not only identifiable, but were in fact identified and targeted by the map-makers for discriminatory treatment. See Parts III and IV-A *infra*. Similarly, contrary to the assertion that adverse political impact cannot be judicially determined (Def. Br. 17-18) the effect of the Plan upon Democratic voters in Indiana has been overwhelmingly demonstrated. See pp. 12-14 *supra* and Part III *infra*. Indeed, to contend otherwise is to ask the courts to blind themselves to a reality that any thoughtful citizen recognizes as not only likely but inevitable. And, finally, this case presents no "political

question" regarding legislative intent (Def. Br. 19-21). Here the intent of the map-makers was unabashedly admitted in the testimony below. See Part IV-A *infra*.

In sum, well developed and judicially manageable standards under the equal protection clause are readily available for judicial resolution of this case. This is true whether this Court chooses to resolve this case by application of long established equal protection doctrines prohibiting intentional and invidious discrimination against one group of citizens and in favor of another (see p. 18 *supra* and Part IV *infra*); or by application of well developed objective criteria for judicial review of reapportionments that disadvantage an identifiable group without neutral or rational justification (see p. 19 *supra* and Part V *infra*); or by application of any of several "bright line" tests available to the Court on this record (see Part VI *infra*). In short, on the facts presented by this record, judicially manageable standards for resolution of this case are not merely available, they abound.

III. DEMOCRATS IN INDIANA ARE INJURED MEMBERS OF AN IDENTIFIABLE GROUP ENTITLED TO CONSTITUTIONAL PROTECTION

A. Democrats Can Invoke the Equal Protection Clause

Members of political parties are entitled to the protection of the Constitution whether this is viewed as an individual right or a group right.²² Surely the equal protection clause prohibits a state from imposing a tax only on members of one party, justified by the specious claim that the tax is avoidable by changing parties. The Indiana apportionment laws are no different. They seek to, and do, prevent a party from obtaining control of the

²² The distinction, at least in voting terms, is meaningless. See Note, *The Constitutional Imperative Of Proportional Representation*, 94 Yale L.J. 163, 175-82 (1984).

legislature even if its votes warrant that control.²³ Moreover, the first amendment right of association is one of the core values that requires "special scrutiny" of any law that seeks to deviate, impair or penalize that right. *Elrod v. Burns*, 427 U.S. 347 (1976); *NAACP v. Button*, 371 U.S. 415, 439 (1963).²⁴ Democratic voters in Indiana are identifiable, as the district court found (A-26).²⁵ Defendants' argument to the contrary is especially curious in light of the history of this case. The majority party spent \$250,000 on sophisticated computer equipment, cre-

²³ In this regard the case is very different from *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 166 (1977), where the Court held "as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgement of their right to vote on the grounds of race." Here there is no statewide fair representation of Indiana Democrats. The Court in *United Jewish Organizations*, analogized the plaintiffs in that case to a political minority "submerged year after year by the adherents to the majority party who tend to vote a straight party line." *Id.* at 167. Indiana Democrats are submerged year after year not by the vote of the majority party, but by the vote of an at best sometime majority party serving as a permanent majority because of a gerrymandered apportionment.

²⁴ This proposition is discussed more fully in the Brief Amicus Curiae of the Republican National Committee In Support of Appellees.

²⁵ If one has, as MOR does, a data base containing each precinct's results in the anonymous races, a computer can readily measure the baseline party vote in any hypothetical district. This information is not at all easily assembled. It exists in public records only in the form of hand posted results in the office of the clerk of each of the 92 counties. Results from previous elections are not always readily found. Even after the results for a given election are known, because precinct lines change from time to time, one cannot just compare the totals from the same numbered precinct from year to year. And simply the mechanics of adding and balancing all these results are overwhelming. For these reasons, anyone who had no access to MOR's computer was wholly unable to respond to the plan unveiled in the legislation in the forty hours the Democrats were given to accomplish that task.

ated an elaborate security system to safeguard the information produced by its computer analysis, and distorted the legislative process to exclude public participation, all because they too believed that they could identify Democratic voters in the State of Indiana and measure the handicap placed on them. The method employed by defendants' highly paid consultants to achieve that goal was exactly the same as that employed by plaintiffs in this case: identifying and measuring party affiliation by analysis of historical votes for court reporter and clerk races (Schneider Dep. 13-14, Exs. 104-107). This use of baseline party vote to evaluate and handicap the districts is not just theory. It is what the majority's hired experts actually did to draw the 1981 maps (A-26).

Defendants' contention that many groups other than Democrats cannot be readily identified is simply not at issue here. On this record and in this lawsuit the Court is presented with a group that is identifiable and was in fact identified by the mapmakers as Democratic voters in the State of Indiana. Their status as such and their location are identifiable from public records. By virtue of that fact and that fact alone plaintiffs have suffered a diminution of a fundamental right—the right to vote and to have that vote counted fairly and equally. In that respect there is no distinction whatever between Democratic voters in this case and urban voters in *Baker v. Carr*.²⁶

The implications of defendants' claim that plaintiffs do not constitute a protectible class are enormous. In the case of reapportionment it would mean that literally no attempt by the party in power to minimize the effectiveness of the minority vote would be actionable so long as the principle of equal population was met. The absurd

²⁶ See Howard and Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615 (1983); *The Constitutional Imperative*, note 22 *supra*.

hypothetical of a three district Indiana could become a reality,²⁷ and the status of the map-makers as the majority party would be immune from challenge at the ballot box.

The fact that voters can change their party affiliation does not remove the group from constitutional protection. It is well settled that members of groups defined by characteristics that can be changed are still entitled to the protection of the fourteenth amendment. For example, "discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible." *Davis v. Mann*, 377 U.S. 678, 691 (1964). See also, *Mahan v. Howell*, 410 U.S. 315, 331-32, modified, 411 U.S. 922 (1973). Indeed, in *Baker v. Carr* and *Reynolds v. Sims*, individual members of the disadvantaged urban populations could move to the countryside if they wished. And in other contexts penalties based on political affiliation have been held unconstitutional. *Elrod v. Burns*, 427 U.S. 347 (1976).

B. Democrats Are Impermissibly Handicapped by the Plan

Plaintiffs' proof of the disadvantage imposed by the Plan does not rest on the election results of 1982. Rather, as shown below, the 1982 results simply confirm the severe bias of the Plan that is shown by this record.²⁸ 1976

²⁷ Plaintiffs' Exhibit 51 (JA-57) shows an equipopulous gerrymander using only three districts and adhering perfectly to county lines. It creates an unassailable majority for the Republicans under any foreseeable electoral result. Plaintiffs' Exhibit 52 (JA-58-60) is an example of a three district map that produces the same permanent control for the Democrats. The point is that districts of different sizes alone give the mapmakers sufficient discretion to override population and every other consideration.

²⁸ Because of the "balloon effect" correctly observed by some amici and spelled out in Backstrom, note 2 *supra* at 1134-1136, Democrats receiving 52% of the vote should receive 55% to 65% of the seats in a fair apportionment.

and 1982 were the most normal years among the last several elections. In both years the State split essentially evenly between the two major parties. Plaintiffs' exhibit 41 shows the outcome of the 1976 and 1982 anonymous races poured into the House districts of the Plan. These returns yield a Democratic vote in the 51st most Democratic seat under the Plan of 46.3% and 45.7% respectively. Plaintiffs' exhibit 35 (JA-45) shows the results of a nearly dead-even hypothetical anonymous race using the average of the 1982 Auditor and Supreme Court Clerk races. In this hypothetical race the Democratic candidates receive 50.15% of the vote statewide but capture only 38 of the 100 House seats under the Plan. There can be no more severe handicap than a scheme that assures a Republican majority on any foreseeable electoral result.

The central point is that these baseline data are not predictions of a given race, but rather are a measure of the districts' handicaps or advantages. It is this data, not the actual results in a given election, that is most significant to measure the handicap and therefore the harm. The fact that a given runner wins a race does not preclude his being unfairly handicapped. And when the handicap is the result of state law unjustified by any legitimate state interest, an equal protection violation is shown.

Once this point is grasped, many of the "horribles" raised by defendants and some amici simply evaporate. No revisions of apportionment laws are necessary as a result of future election results. No claim to proportional representation is made. Indeed, no right to any representation is claimed—only a right to be free from state imposed arbitrary obstacles that leave the currently "out" party "barred from the pluralist's bazaar". Brief of Amicus Curiae Assembly of The State of California In Support of Appellants at 12 (quoting ELY, DEMOCRACY

AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) at 152).

The role of the 1982 actual election results is simply to confirm the Plan's handicaps. That the majority party succeeded in minimizing or canceling out the vote of Democrats in Indiana was clear from the results of the election under the Plan. Despite receiving 51.9% of the statewide vote, the Democrats captured only 43 of the 100 seats in the House. Although the results in the Senate, if viewed superficially, may appear "fair" they actually reflect the same extreme bias against the minority. Thirteen of the 25 seats up for election in 1982 were Democratic in composition. In contrast only seven of the 25 seats up for election in 1984 were Democratic in composition. Even if Democrats received a slight majority of the statewide vote again in 1984, they would have gained only another seven Senate seats for a total of 20 of the 50 seats. Thus the contention by the dissent below and the defendants that the 1982 Senate results show the fairness of the Plan rest on a fundamental logical error. The effect of the Plan is severe, indeed prohibitive of an effective vote by the transient minority.

IV. THE REAPPORTIONMENT PLAN IS UNCONSTITUTIONAL BECAUSE IT WAS INTENTIONALLY DESIGNED TO, AND DOES DISADVANTAGE DEMOCRATS IN INDIANA

A. The Evidence as to Subjective Intent

The subjective intent that was proved here is plainly an improper one—to design a law that minimizes the legislative voice of a major portion of the population. In that respect this case is the flip side of *Gaffney v. Cummings*, 412 U.S. 735 (1973), which held legitimate an intent to provide representation reflecting voting strength. Presumably the nature of the acting entity (in *Gaffney*

a bipartisan commission and here a transient partisan majority) gives a strong indication of presumed intent. But this case presents an unusually strong proof of intent. Unlike the traditional discrimination case where the focus of the inquiry is whether intent may be inferred from the facts surrounding the adoption of legislation, in this case that analysis is made unnecessary by express statements from the majority party's legislative leaders—the authors of the Plan.

Thus there is no need to prove a history of discrimination when it is admitted that the law was intended to have an adverse impact on a given group. Such factors as historical practices are simply one of several means of showing the unlawful purpose of the law. Here the unlawful purpose was proven directly. A history of discrimination is not an element of plaintiffs' case; it is one of several means of proof of the element of intent. To illustrate the point, blatantly segregationist laws would be no less unconstitutional if passed today in a state with an impeccable racial record. Nor would a law aimed at persons of English descent be constitutional by reason of its novelty.

The evidence is overpowering in support of the district court's findings. The Speaker of the Indiana House identified a goal of reapportionment as having "as many Republican districts as possible" (Dailey Dep. 20, 63; Oct. R. 29-30) and testified that the *sole* reason for maintaining multimember districts in and around Marion County was the probable loss of Republican seats if single-member districts were used (*id.* at 33-34). In the Senate, the leadership also freely admitted that the Plan was drawn "to hurt the Democrats as much as possible" (Bosma Dep. 110; Oct. R. 29-30). Senator Bosma also explained that the Legislative Services Agency was not used in the reapportionment process because "any partisan activity was strictly prohibited on the part of the [Agency's] employees" (*Id.* at 163). In short, the intent to discriminate against Democrats was freely admitted by the General

Assembly leadership, secure in the incorrect belief that a 2% population deviation would provide a safe harbor for the Plan.

Faced with these admissions, defendants belatedly ask this Court to ignore them, claiming that legislative intent cannot be inferred from the statements of individual legislators.²⁹ But this evidence is properly considered. First, the cases on which defendants rely deal with a fictional legislative "intent" urged as a guide to construction of a statute. But here the operation of the law is clear; it is the actual purpose of the law that is in issue. And as to that issue there can be no better evidence than admissions by the legislative leaders.³⁰ Further, the usual roles of the agent and principal are reversed in this situation. The Plan was created by the very persons whose testimony is offered. It was simply ratified by the legislature at the instance of the leadership. There are, in this case, no better indicia of legislative intent than the expressions of intent by the individuals who drafted the Plan, explained it to their fellow majority legislators, and prevented its analysis by the minority or the public. The issue raised by some amici—whether discovery or subpoena of legislative leaders is appropriate—is not preserved on this record. No objection was made to the offered evidence and no effort was made to block discovery. Perhaps legislators who do not consent to give testimony

²⁹ Defendants' challenge to the relevance of statements made by the majority's leadership is apparently limited to instances in which those comments hurt defendants' case. Defendants repeatedly rely on comments of individual purpose by those same individuals in seeking to identify a neutral criterion, *e.g.*, claimed concern for preservation of black representation, that might have been employed. As the district court found, however, none of these self-serving claims withstands even superficial analysis. None justifies the plan as adopted (A-32). Nor was any of these purportedly neutral criteria consistently applied.

³⁰ See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

as to legislative intent may not be compelled to do so for reasons of interbranch comity. But that is an issue for another day.

B. The Objective Evidence of Intent

Even in the absence of expressions of the majority's intention to disadvantage Democratic voters, the district court's finding of specific subjective intent is fully supported by the record. Indeed, it is obvious from the fact that the resulting Plan is otherwise inexplicable. No conceivable neutral criteria could explain, for example, the majority party's decision to take Marion County, a large metropolitan county with a population entitled to exactly 14 representatives, and add to it parts of surrounding rural counties in order to create five triple-member districts. Similarly, the decision to split the city of Fort Wayne and County of Allen in half creating two triple-member districts is explainable only by political motives. The same is true of Senate District 39, ranging over many miles to combine parts of downtown Terre Haute with rural and mining areas of three other counties. There is no need to belabor this point here. A review of the statement of the case demonstrates that the district court's finding of subjective intent is not clearly erroneous. It is clearly correct whether one considers only the direct evidence or only the subjective evidence or both.

V. THE PLAN IS OBJECTIVELY INDEFENSIBLE AS AN ARBITRARY CLASSIFICATION UNDER STANDARD EQUAL PROTECTION DOCTRINES

The Plan is, first and foremost, a law of the State of Indiana. It is a law that was specifically and intentionally passed for purposes of advantaging one group of citizens to the disadvantage of another. The right that underlies plaintiffs' claim is readily identifiable—it is the right created by the fourteenth amendment to be free from any unjustified state action disadvantaging any per-

son or group. The apportionment of legislative districts so as to prevent a political group from obtaining majority status, even if its votes justify that status, is a disadvantage of monumental proportions.³¹ That the Plan imposes such a disadvantage has already been established. The district court's finding that there is no justification for this result is equally sound.

A. Use of Isolated Multimember Districts

Rather than using only single-member legislative districts the majority created Plan mixes 61 single-member districts with nine double-member and seven triple-member districts. On its face this scheme treats different groups of citizens differently. This is not just mathematical theory; it is common sense. In both urban or rural areas, the larger the district, the more difficult it is to have face-to-face contact between voters and representatives. In many urban areas, access to media is a practical impossibility because of the expense of media aimed at large populations.³² And without adherence to

³¹ Stacking members of the minority party together so as to prevent them from electing more than one representative, or splitting them into various districts so as to prevent them from electing any representative, have precisely the same effect as other clear cases of denial of equal protection such as failing to count votes (*United States v. Mosley*, 238 U.S. 383 (1915)), stuffing the ballot box (*United States v. Saylor*, 322 U.S. 385 (1944)), imposing a poll tax (*United States v. Texas*, 252 F. Supp. 234 (1966), *aff'd*, 384 U.S. 155 (1966)), or allowing districts to have great population disparities (*Reynolds v. Sims*, 377 U.S. 533 (1964)). They have the effect of foreclosing participation by a group of citizens in the most fundamental of all governmental acts—the passage of laws. The effect is to wall that group out of the process of formulating state policy.

³² Jewell, note 12 *supra* at 131:

The tactics and costs of state legislative campaigns are quite different in single-member and in large multimember districts. In single-member districts most legislative candidates run their own campaigns. They raise their own funds and build

any established lines, districts leave voters ignorant of even the names of their representatives.³³ These factors can be overcome in a smaller, single-member district. They are insurmountable in the multimember district with the result that party machinery controls nominating procedures and party votes dominate in the fall. In short, multimember districts constitute a separate classification.

small organizations of volunteers. They run personal campaigns, going door-to-door, frequenting the shopping centers and other gathering places, and speaking to neighborhood groups. There is a maximum of personal contact, and a minimum of emphasis of issues. Candidates may seek the support of organized groups and may get some help in the general election from the party organization, but their success does not depend heavily on such groups. Except in the larger, more populous districts (such as those in California, New York, or Ohio), the cost of such campaigns is relatively low.

³³ The Court has repeatedly recognized the many problems inherent in multimember districts: Confusion among voters is prevalent. *Chapman v. Meier*, 420 U.S. at 15. Ballots are long and cumbersome. *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 731 (1964). Bloc voting by delegates from multimember districts may result in excessive representation of residents of those districts relative to voters in single-member districts. *Chapman v. Meier*, 420 U.S. at 16. And electoral minorities may be submerged. *Connor v. Finch*, 431 U.S. 407, 415 (1977). The point is not that these districts are per se unconstitutional. They are not. *Whitcomb v. Chavis*, 403 U.S. at 158. The point is that they are different, and therefore constitute a classification of citizens requiring justification.

Others share the Court's view that there are problems inherent in the use of multimember districts. The Justice Department has rejected apportionment schemes using multimember districts in a number of states covered by the Voting Rights Act. Engstrom, *Racial Vote Dilution: Supreme Court Interpretation of Section 5*, 4 S.U.L. Rev. 139 (1978). And the use of multimember districts by states has been declining. In 1970 46% of the upper houses and 62% of the lower houses in state legislatures contained some multimember districts. *Whitcomb v. Chavis*, 403 U.S. at 157. By 1981 those figures had declined to 22% (11 of 49) and 43% (21 of 49) (Def. Ex. GG; Nov. R. 126, 127). Nebraska has a unicameral legislature which also has no multimember districts.

And, as Justice Stevens observed, "it is by no means obvious that an occasional multimember district in a State which typically uses single-member districts can be adequately explained on neutral grounds." *City of Mobile v. Bolden*, 446 U.S. 55, 92 n.14 (1980) (Stevens, J., concurring). No neutral criterion is at play here—only the desire of the majority to protect its status as the legislative majority irrespective of its majority at the polls.

These districts are at the core of the constitutional violation. Undaunted by the fact that the population of Marion County entitled it to precisely fourteen representatives and seven senators, the majority created five triple-member House districts for Marion County by patching on areas from two contiguous counties. This creative cartography enabled the majority to continue to stack Democratic voters in one triple-member district in the hole of the donut while diluting significant concentrations of Democratic voters into the four triple-member districts in the surrounding area. The result is 12 safe seats for the majority.

In Allen County, which, like Marion County, is essentially square in shape, the same goal gave rise to a different scheme. Rather than "stacking" the minority vote, the majority "cracked" it in half by splitting the otherwise Democratic city of Fort Wayne in two and combining each half with parts of the rest of Allen County and parts of *three* surrounding rural counties to create two solidly Republican triple-member districts. In sum, the result of these techniques was the election of 18 (86%) Republican representatives and 3 (14%) Democratic representatives from these two areas whose populations comprise 21% of the state. This despite the fact that the vote in these areas was 46.3% Democratic.

Finally, the Court's treatment of multimember districts fully supports a finding of unconstitutionality.

This Court has long recognized that "multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973). *White v. Regester*, 412 U.S. 755 (1973), is the only case decided by this Court in which multimember districts enjoyed no independent and legitimate justification and had a demonstrable adverse effect. The Court there sustained a claim that the use of multimember districts in Bexar and Dallas counties unconstitutionally diluted the voting strength of Mexican-Americans and blacks respectively. The Court's finding was based on effect, absence of rational grounds apart from race, and intent as garnered from evidence of (1) a long history of discrimination, (2) indifference on the part of elected officials, and (3) restricted access to the political process. Each factor is equally present here.

On the occasions the Court has rejected challenges to multimember districts, each involved either or both of (a) rational grounds for the districts apart from disadvantaging a minority—typically preservation of political boundaries, or (b) failure to allege any effect or, if alleged, to prove it.³⁴

³⁴ In *Fortson v. Dorsey*, 379 U.S. 433 (1965), senate districts were made up of one or more counties. In *Kilgarlin v. Hill*, 386 U.S. 120 (1967), complete and contiguous counties were used for multimember and "floterial" districts. *Abate v. Mundt*, 403 U.S. 182, 187 (1971), emphasized "the long tradition of overlapping functions and dual personnel in Rockland County government and the fact that the plan before us does not contain a built-in bias tending to favor particular political interests or geographic areas."

Fortson v. Dorsey observed that the question whether multimember districts minimize or cancel out the voting strength of racial or political elements of the voting population was not presented by the record. 379 U.S. at 439. *Burns v. Richardson*, 384 U.S. at 88, stated that:

B. The House and Senate Plans Are Not Nested

Indiana's bicameral legislature is divided into a 50-member Senate and a 100-member House. If the districts were truly drawn to reflect neutral criteria, common sense and logic would dictate that the apportionment plans be arranged so that each Senate district contain two House districts.³⁵ Indeed, until the equipopulous gerrymanders came along in 1972, Indiana plans did just that by treating counties or groups of counties as units for this purpose. But neutral criteria have no place in Indiana's 1981 reapportionment. In no instance are two House districts "nested" in a single Senate district. Especially when added to the Plan's wholesale disregard for county lines, this legislative Rohrschach test means that "the potential for voter disillusionment and nonparticipation is great, and the fundamental American principle of self-government is threatened" (A-29).

C. Existing Political Boundaries Are Wholly Disregarded

The majority's blatant disregard for existing political boundaries is apparent in view of the fate of political

³⁴ [Continued]

The demonstration that a particular multimember scheme effects an invidious result must appear from evidence in the record. That demonstration was not made here.

And in *Whitcomb v. Chavis*, 403 U.S. at 124, the Court explicitly noted that:

There is no suggestion here that Marion County's multimember districts or similar districts throughout the state, were conceived or operated as purposeful devices to further racial or economic discrimination.

³⁵ As of 1981, 16 states had nested plans (Def. Ex. GG; R. 126, 127). Other than Indiana, only seven states with a number of House districts that was an even multiple of the number of Senate districts did not have nested plans (*Id.*). All but two of those seven states are required by state law to preserve political boundaries when apportioning. Grofman, *Criteria for Districting: A Social Science Perspective*, table 3 (1985 forthcoming).

subdivisions under the Plan which are themselves a multiple (within the 2% population deviation utilized by the majority) of the ideal district size. Rather than use these natural building blocks, the majority split every one of them. Examples appear at page 16 of the Motion to Affirm and at p. 10 *supra*.

D. Bizarre Shapes Abound

As is typical of gerrymandering for whatever purpose, the Plan employed by the majority includes many grotesque districts. *Reynolds v. Sims*, 377 U.S. at 568, observed that "the existing apportionment * * * presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone." If not an independent basis for unconstitutionality, at least these shapes are an indication of improper purpose calling for an explanation. As the district court found, the plan "is replete with 'uncouth' and 'bizarre' configurations that beg for some rationale, yet the state has set forth none which justify either the shapes or the concomitant adverse impact upon the plaintiffs" (A-27).³⁶

E. The Legislative Process Was Exclusionary

The Plan was developed by use of a very expensive and sophisticated computer program bought and paid for, not by the General Assembly, but by the Republican State Committee. The bills that became the law went through the entire legislative process with no content. These "vehicle bills" were adopted in insignificantly different forms by each house so that they could be assigned to a conference committee comprised *solely* of Republicans. When the Plan was finally unveiled, literally in the middle of the night at the end of the session, it was in the form of a conference committee report. Each house then adopted the Plan by a party line vote and adjourned. The result of this process was the effective

³⁶ The district court described some of these shapes at A-14 through 16 and 28 through 29.

exclusion of any opportunity for comment on the Plan prior to its adoption.

"If the process for formulating and adopting a plan excluded divergent viewpoints, openly reflected the use of partisan criteria, and provided no explanation of the reasons for selecting one plan over another, it would seem appropriate to conclude that an adversely affected plaintiff group is entitled to have the majority explain its action." *Karcher v. Daggett*, 462 U.S. 725, 759 (1983) (Stevens, J., concurring). The only explanation is that candidly offered by the majority leadership: It is raw use of political power to perpetuate that power.

F. The Plan Is Wholly Inconsistent

Other than acting on the stated intention to disadvantage members of the minority, the Plan does not reflect the application of any consistent principle. In some cases the Plan goes out of its way to create districts that encircle a city (*e.g.*, Richmond in House District 56 encircled by District 55 and Kokomo in House District 30 encircled by District 29). In others it splits a city down the middle (*e.g.*, Fort Wayne in Senate Districts 15 and 16 and House Districts 19 and 20, Evansville in House Districts 75 and 77 and Senate Districts 49 and 50, and Muncie in House Districts 34 and 35).

In the major metropolitan areas of Indiana one finds:

(a) Five triple-member House districts in Marion County (population 765,233) and environs.

(b) Six double-member and two single-member districts in Lake and Porter Counties (populations 522,965 and 119,816 respectively) and environs.

(c) Two triple-member districts in Allen County (population 294,335) and environs.

(d) One double-member and five single-member districts in St. Joseph and Elkhart Counties (populations 241,617 and 137,330 respectively).

(e) One double-member and two single-member districts in Vanderburgh County (population 167,515) and environs.

Thus, the Plan creates multimember districts in populous (Marion and Allen counties) and relatively unpopulated areas (Grant and Madison counties, District 31). It has single-member districts in many rural areas and also in the most densely populated (Lake County, District 13, Vanderburgh County, District 77).

VI. "BRIGHT LINE" STANDARDS ARE AVAILABLE

Just as population ratios can serve as bright lines for guidance of courts and legislatures, so can other readily administered and mechanical tests restrict arbitrary legislation without embroiling the courts in endless fine distinctions. Each of these tests enjoys a sound basis in the fundamental equal protection notion that a state "must govern impartially." If a state elects to breach any of these tests, it must bear the burden of demonstrating the need for that breach. And here, as the district court held, there is no justification whatever for the 1981 Indiana maps. Each is independently sufficient to strike down the 1981 Indiana Plan, because the Plan violates all three. The first two by definition apply only to state and local bodies.

A. Mix of Different Sized Districts

The presence of different sized districts in the same plan clearly gives the map-maker a discretion that does not otherwise exist. This is demonstrated by plaintiffs' exhibit 54 (JA-61) showing how an evenly divided electorate can produce a three to one majority for either of two parties by use of a mix of triple-member and single-member districts. There is no qualitative difference among that simple example, the absurd three district Indiana plans (*see* footnote 27 *supra*) and the actual 1981 Indiana Plan. Each uses the flexibility afforded by multimember districts to accomplish an illegitimate end. None is justified by any proper objective. And each is readily identified.

B. Nesting

Nesting provides another simply administered restriction. What is proper for one house is proper for the other. By requiring nested districts where applicable, another element of discretion is restricted. If a boundary is justified by any neutral principle it is likely to be justified for both houses, and the State should be required to prove the need for any deviations from this principle. Again, as a matter of equal protection, this is simply a matter of treating everyone the same. To the extent the legislature wishes to justify its deviation from this neutral criterion, it must bear the burden of showing a proper state interest.

C. Deviation from Political Units

Because the state legislative districts in most states are smaller than congressional districts, this factor, like the first two, may have little application to congressional maps.³⁷ This Court has recognized that allowances for representation of political units may justify population deviations that are unwarranted in congressional maps. *Gaffney v. Cummings*, 412 U.S. at 742 (quoting *Reynolds v. Sims*, 377 U.S. at 577). If so, however, "[t]he inquiry then becomes whether it can reasonably be said that the state policy urged by [the state] to justify the divergences in the legislative reapportionment plan . . . is, indeed, furthered by the plan adopted by the legislature, and whether, if so justified, the divergences are also within tolerable limits." *Mahan v. Howell*, 410 U.S. at 326. As further observed in *Mahan v. Howell*: "The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature * * * is a rational one," *id.* at 329, and multimember dis-

³⁷ "[A]most invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, and . . . therefore it may be feasible for a State to use political subdivision lines to a greater extent in establishing state legislative districts . . ." *Mahan v. Howell*, 410 U.S. at 321.

tricts may be used to that end under some circumstances. This greater latitude exists because of the state interest in protecting existing political boundaries. It goes back to *Reynolds v. Sims*: "A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions as political subdivisions. * * * And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering." 377 U.S. at 580-81. But when, as here, the rational state policy is not served, indeed, is flaunted, the reason for greater latitude evaporates. *Cf. Brown v. Thomson*, 462 U.S. 835, 850-60 (1983) (Brennan, J., joined by Justices White, Marshall and Blackmun dissenting). For that reason, court-ordered apportionments may not create multimember districts and must meet the more rigorous "congressional standard" for population deviation. *Chapman v. Meier*, 420 U.S. at 18; *Connor v. Finch*, 431 U.S. at 414; *City of Mobile v. Bolden*, 446 U.S. at 66.

The Indiana Plan would have it both ways: population deviation without any justification in geographic or political units or any other legitimate state interest.³⁸ By requiring that natural building blocks be used within the state-selected population deviations, the state may choose between these priorities but may not arbitrarily disregard both. Just as *Reynolds v. Sims* requires population equality, a requirement of adherence to political units (cities, towns, counties and combinations of contiguous units) that meet the general population deviation selected (2% in the 1981 Indiana plan) is easily and mechanically applied.³⁹ If, on the 1980 Indiana census, the nat-

³⁸ The 2% deviations (4% in range from high to low) allowed by the Plan would be unacceptable in a Congressional map. *Karcher v. Daggett*, 462 U.S. 725 (1983).

³⁹ "A better constraint on potential gerrymandering [than compactness and contiguity] is imposed by the use of established

ural building blocks were used, that too would significantly restrict the potential for arbitrary action and further both commonality of interest and the voters' awareness of who their representatives are. It simply recognizes that the rationale for allowing greater population deviation in state maps to permit recognition of political lines does not apply if the maps disregard those units. As a result, a plan that goes beyond minimal deviations without any justification is unconstitutional.

CONCLUSION

Reynolds v. Sims has led to revitalized state governments and renewed vigor of state legislative process. It was a landmark, yet modern technology has now effectively overruled *Reynolds v. Sims* and restored the monarchy of the "ins" at the expense of the current "outs". The notion of majority rule as a cornerstone of the republic turns on the ability of any minority or group of minorities to attain majority status if its voting power warrants. The courts must act to preserve access to the levers of government where, as here, there is no other recourse to prevent the abuse of power to perpetuate itself. The judgment of the district court should be affirmed.

Respectfully submitted,

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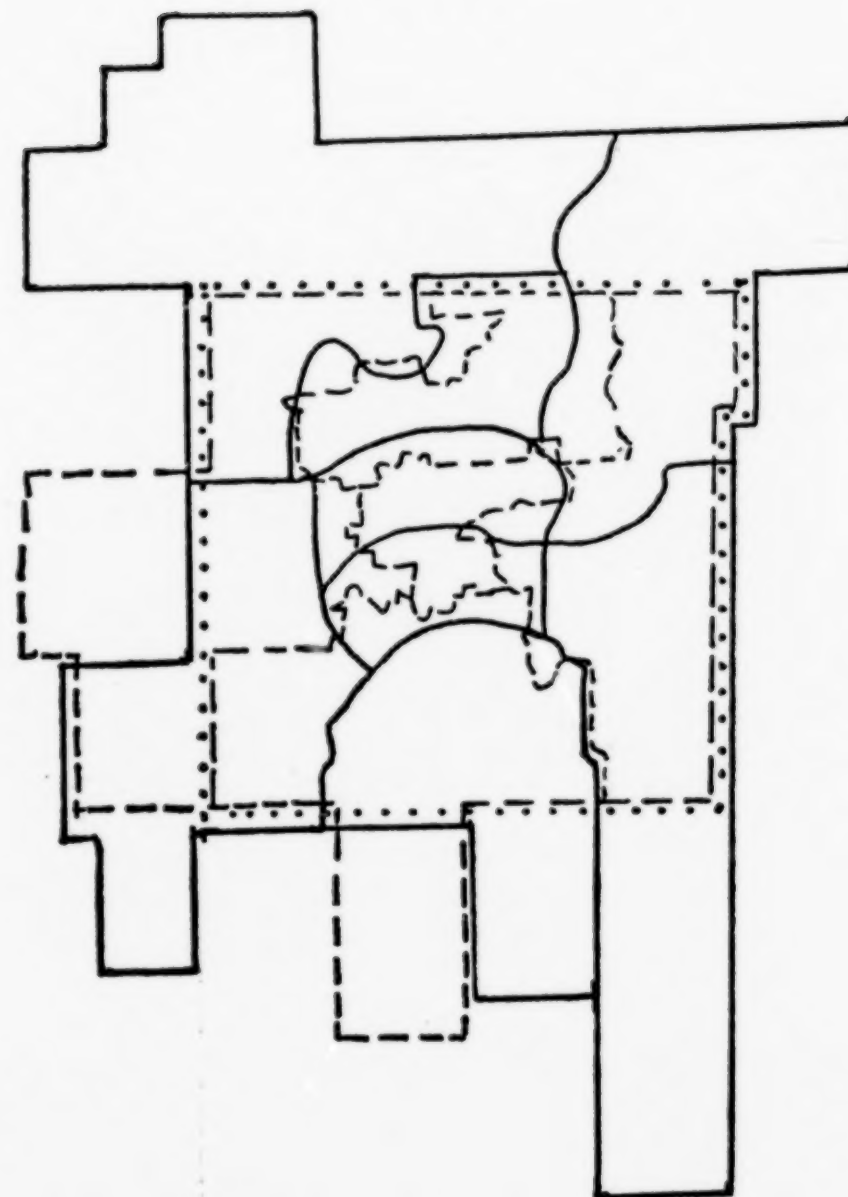
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political boundaries * * * to the extent that the attainment of precisely equal districts requires abandonment of longstanding political boundaries, gerrymandering is that much easier." *Connor v. Finch*, 431 U.S. at 429-30 (Blackmun, J., concurring in part and concurring in the judgment joined by the Chief Justice).

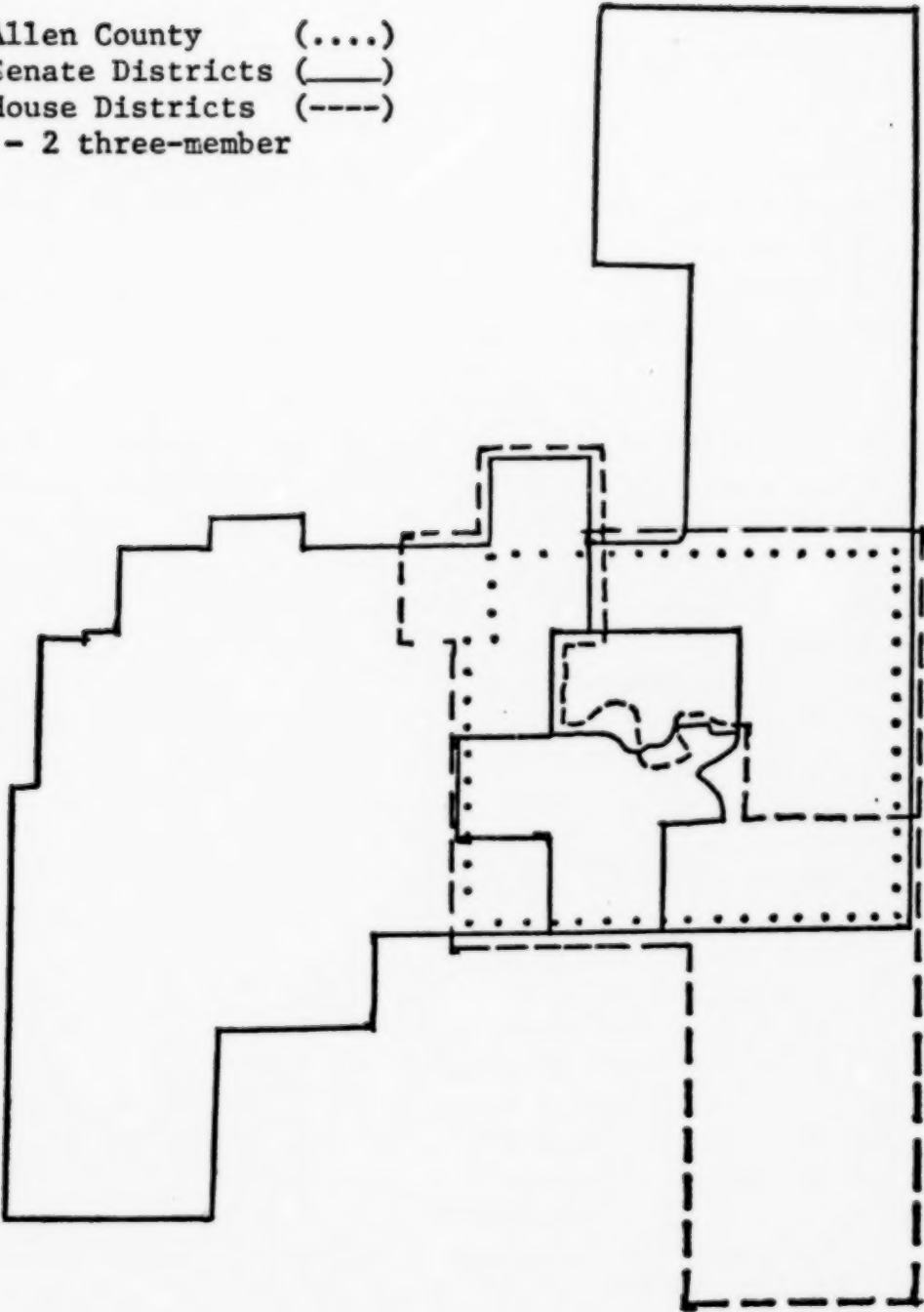
APPENDIX



Marion County (....)
Senate Districts (—)
House Districts (---)
- 5 three-member

2a

Allen County (.....)
Senate Districts (———)
House Districts (----)
- 2 three-member



No. 84-1244

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

October Term, 1984

SUSAN J. DAVIS, *et al.*,

Appellants

vs.

IRWIN C. BANDEMER, *et al.*,

Appellees.

**APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF INDIANA**

REPLY BRIEF OF APPELLANTS

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**APPEAL FROM THE UNITED STATES
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DISTRICT OF INDIANA**

REPLY BRIEF OF APPELLANTS

In suggesting that this case requires application of simple, "bright line" standards and characterizing themselves as powerless victims of the political process, Appellees Bandemer, *et al.* (the "Democrats") ignore many of this Court's prior opinions and ignore their party's own failure to capture competitive seats in Indiana. This Court cannot, however, ignore the legal quagmire and factual

weaknesses surrounding the Democrats' claims and should not accept the invitation to affirm the lower court's ruling by a process of judicial legislation.

I.

THIS COURT HAS PREVIOUSLY REJECTED PARTISAN GERRYMANDERING CLAIMS AS NONJUSTICIABLE

The Democrats' attempt to distinguish this case from the Court's prior rejection of claims of partisan gerrymandering incorrectly characterizes the facts and the questions presented in those prior cases.¹ In *WMCA, Inc. v. Lomenzo*, 238 F.Supp. 916 (S.D.N.Y. 1965), *aff'd*, 382 U.S. 4 (1965), for example, this Court affirmed the lower court's holding that New York's reapportionment statutes satisfied the Fourteenth Amendment, thereby rejecting questions presented with respect to (i) whether political gerrymandering can violate the Fourteenth Amendment and (ii) whether New York's statute violated the Fourteenth Amendment when it established districts which were not convenient and compact, which departed substantially from geographic and political subdivision boundaries, and which were deliberately designed to and adopted in a manner as to systematically minimize the voting power of certain persons. *See* 34 U.S.L.W. 3017 (1965). Significantly, the Democrats also ignore Justice Harlan's observation that the Court by its decision affirmed the nonjusticiability of partisan gerrymandering. 382 U.S. at 4.

Similarly, in *Wells v. Rockefeller*, 311 F.Supp. 48 (S.D.N.Y. 1970), *aff'd*, 398 U.S. 901 (1970), this Court

¹ As the Democrats correctly point out, summary affirmances reject the specific questions presented in the jurisdictional statement, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), and dismissal of an appeal for want of a substantial federal question represents a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. *Washington v. Confederate Bands and Tribes*, 439 U.S. 463, 476 n.20 (1979).

affirmed the rejection of a partisan gerrymandering claim and rejected questions presented whether partisan gerrymandering was a justiciable issue in the federal courts and whether districts which were "grotesquely shaped" and noncontiguous and which did not achieve compactness or avoid splitting political subdivisions violated the Fourteenth Amendment. *See* 38 U.S.L.W. 3446 (1970). *See also Archer v. Smith*, 409 U.S. 808, *aff'g in part Graves v. Barnes*, 343 F.Supp. 704 (W.D. Tex. 1972) (rejecting the question whether standards for redistricting should be revised to prohibit partisan gerrymandering). In sum, despite whatever language in prior opinions might be construed to recognize partisan gerrymandering as justiciable, and contrary to the assertions of the Democrats in their brief, in cases where the issue was actually raised this Court has rejected justiciability for claims of partisan gerrymandering.²

Moreover, appellees and amici still fail satisfactorily to address a major impediment to justiciability: the lack of any manageable standard for identifying the "protected group." The Democratic Party and the Republican Party may for some purposes constitute an identifiable class, but not for purposes of assessing discrimination in a reapportionment plan, especially one designed to operate over a full decade of changing demographics, party policies and party affiliation. The problem is compounded here since the claimed discrimination is not even asserted to be solely against members of the Democratic Party. Instead, the Republican National Committee as amicus would have the class defined by "party affiliation or electoral tendencies", Brief Amicus Curiae of the Republican National

² The Democrats' suggestion that the justiciability of their partisan gerrymandering claim was resolved in *Baker v. Carr*, 369 U.S. 186 (1962) (Brief of Appellees, at 24-26) is rather disingenuous. As the court below held, the "one man, one vote" issue addressed in *Baker* is not present here (A-10). *Cf.* Amicus Curiae Brief of Common Cause at 5 ("Nothing, here, corresponds to the principle of 'one person, one vote.'").

Committee, at 10 (emphasis added), or by "voting patterns", *id.*, at 11 n.8. Common Cause identifies the class as "likely Democratic voters" Amicus Curiae Brief of Common Cause, at 12.

The Democrats themselves attempt to skirt the issue by relying on the conclusions of the court below, Brief of Appellees at 28, and by defining the protected class in a bootstrap fashion according to historical voting statistics that formed part of a computer data base, *id.* at 29. These of course are not people identifiable by group affiliation or any defined set of beliefs. Rather these are nameless statistics accumulated from past elections in which the characteristics of particular candidates undoubtedly made a difference that is simply ignored. That such past election results formed part of a computer data base used in developing the reapportionment plan certainly does not serve to establish an identifiable group and a manageable standard for purposes of constitutional analysis of partisan gerrymandering. Without such a manageable standard, however, this Court cannot uphold the ruling of the court below without embarking on a massive judicial regulation of the state, local and national political life of this country.³

II.

THE INDIANA REAPPORTIONMENT ACTS ARE CONSTITUTIONAL

Regardless of the outcome of elections in any particular year, the test of Indiana's reapportionment plan is whether it meets the constitutional guidelines prescribed by prior opinions of this Court. *Whitcomb v. Chavis*, 403 U.S. 124 (1971). Faced in 1981 and 1982 with the choice of adopting

³ The involvement of the federal courts in what the public perceives as determinations requiring "political" judgments could also impair the public's confidence in the impartiality of the federal judiciary. See, e.g., LaFollette, GOP Takes Remap Ruling to U.S. Supreme Court, Indianapolis News, February 1, 1985, at 25, col. 2 (making note of the political backgrounds of the members of the lower court). See also *Mobile v. Bolden*, 446 U.S. 55, 93 n.15 (1980) (Stevens, J., concurring).

the Reapportionment Acts or the partisan plans offered by the Democrats, the Indiana legislature chose what it considered the fairer alternative.⁴

A. The Democrats Are not "Fenced Out" of the Political Process

The claim of "impermissible handicap" raised by the Democrats (Brief of Appellees, at 30) resulting from "bias" in the Reapportionment Acts does not withstand rigorous analysis. Rather, the "exclusion" of which the Democrats complain "seems a mere euphemism for political defeat at the polls." *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

1. "Competitive" Seats Under the Reapportionment Acts Allow the Democrats to Gain Control

In Indiana "competitive" seats regularly change parties. In 1982, six House incumbents, namely Reps. Collins, Craig, Johnson, Long, Pruett, and Winger, even with the strength of name recognition, were defeated, as shown in Exhibits W and X. In simple terms, considering the number of marginal seats in the House of Representatives, there is no reason to believe that what happened in 1982 will not happen again, because these seats are, by definition, "marginal seats".

⁴ The alternative plans were certainly no better and arguably much worse than the Reapportionment Acts. Indeed, it ill becomes the Democrats to raise an issue of partisan gerrymandering when the Crawford Plan they espouse would have put 16 House incumbents in Marion, Lake and Allen counties in single member districts with another incumbent, 13 of whom would have been Republicans (Exhibit II). Similarly, in the Senate, the Democrats' Carson Plan would have put 14 incumbents in the same district with another incumbent, 12 of whom would have been Republicans (Exhibit SS). Such treatment of incumbents is wholly unnecessary. In marked contrast to the Democrats' plans, the Reapportionment Acts place no incumbents in the same district in the Senate, and only two incumbents in the same district in all of Marion, Lake and Allen counties. Additionally, the Democrats' plans themselves created unusual district shapes. See Exhibits 202, 204, 207, 209, 212, 214, QQ and RR.

Appellants have argued that the existence and number of "competitive" seats in the 45%-55% range adopted by the court below allows the Democrats to gain control of the Indiana General Assembly (Brief of Appellants at 21-23; *see also* A-121 and JA-39 (House), JA-50 (Senate)). The court below apparently agreed, holding that such seats are winnable by the better candidate more "sensitive to the interests of the voters and the issues of the day" (A-11). The Democrats make no direct response, arguing only that their control is impossible based on the state-wide vote in "anonymous" races, which they variously calculate at 51.0% Republican, 50.8% Republican, 44.3% Republican, 44.6% Republican, 56.1% Republican, 57.4% Republican (Brief of Appellees, at 3), 50.9% Republican, 51.2% Republican, and 48.8% Republican (*id.*, at 13).

Although the court below gave no credence to such evidence of the Democrats, which it called "statistics" (A-11), the Democrats still place great emphasis on their statistics and refer to them regularly in their brief, particularly the statewide result in the so-called "anonymous" races. If these statewide averages indicate anything, however, they indicate that the Democrats could have gained control of the Indiana General Assembly in 1982 with more attractive candidates more able to attract the attention of a majority of Indiana voters and offering a more acceptable legislative program, recognized, as stated above, in the lower court opinion itself as an important factor (A-11).

While a simple comparison between votes and seats won on a statewide basis ignores this element of voter preference, a district-by-district examination graphically illustrates its importance in the context of Indiana's Reapportionment Acts. The table in the appendix to this brief makes this comparison based on exhibits prepared by the Democrats. The table shows that for the thirty-nine House districts held to be "competitive" by the court below, in twenty-six districts there was a difference of three percent or more between the Democrat vote in the

"anonymous" 1982 State Auditor's race attributable to that particular district and the actual Democrat percentage of the legislative vote in that district. Thus, voters expressed a preference significantly different from that in the "anonymous" race in fully two-thirds of the competitive districts.

2. If Democrat House Candidates Had Not Run Behind Their Own Ticket, They Would Have Won Control in 1982

The Democrats also seek the attention of this Court by asserting that even if the Democrats win a majority of the state-wide vote for "anonymous" races in two consecutive elections they can never under any circumstances gain control of the Indiana General Assembly (Brief of Appellees, at i, 3-4, 11, 14, 27, 28, 30, 31, 32, 36, 38, and 46).

The court below made no such finding, limiting its analysis to the seat-vote relationship resulting from the 1982 elections to the Indiana House of Representatives (A-11). The court found that the Republicans made "an effort" to maintain control (A-17), but made no finding that they would remain in control if the Democrats running for state office in fact ever won in two successive elections. Indeed, the court expressly rejected statistics to predict future election outcomes after 1982 (A-13).

Since the Democrats lost in 1984 and have never won a majority of the state-wide vote in two successive elections even under their calculations, either before or after reapportionment (JA-37), this pivotal argument of the Democrats is based on conjecture rather than fact and could not have been the basis for the decision of the court below. Moreover, the argument is clearly incorrect. Statistics prepared by the Democrats themselves show that they could have controlled the House of Representatives in 1982 if their losing candidates had not run behind their own ticket.

House district results for 1982 show that losing Democrat candidates able to do as well as the statewide average for their district in the so-called "anonymous" races would have won eight more races. Six of these races were in the "competitive" districts 36, 9 (Budack), 32, 10 (Ayres), 56 and 33. See the table in the appendix, *infra*. In addition, district 71 elected a Republican but was 61.8% Democrat (A-121), and district 62, won by a Republican, in fact was a Democrat majority seat based on the Supreme Court Clerk race (50.3% Democrat, as shown in JA-43) and the Auditor and Supreme Court Clerk race combined (50.1% Democrat, as shown in JA-46). Combined with the 43 seats they actually won, the Democrats would have gained absolute control with 51 votes if they had been able in 1982 to do as well in the races they lost as the very statewide averages they rely on.

B. The Reliance of the Court Below on the 1982 House Seat-Vote Relationship is Wholly Misplaced

Despite the repeated denials of Amici and the Appellees that they are not seeking proportional representation, their analyses and even their language approach just such a request. The Republican National Committee argues, for example, that if the seat-vote ratio is disproportionate "something is surely amiss" (Brief Amicus Curiae of the Republican National Committee in Support of Appellees, at 23), and the Democrats openly argue that "the population of Marion County entitled it [the Indiana Republican Party] to precisely fourteen representatives and seven senators..." (Brief of Appellees, at 38).

This Court has, of course, rejected any suggestion that the Constitution requires proportional representation. *Mobile v. Bolden*, 446 U.S. 55, 79 (1980). In addition, this Court has held that the ability of a group to win a particular election or elections at all is not relevant to a constitutional inquiry. *Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971). Even to the extent that seat-vote ratios might have some

relevance under some circumstances they do not support the lower court's finding of unconstitutionality.⁵

The Democrats have cited *Gaffney v. Cummings*, 412 U.S. 735 (1973) as an example of a reapportionment plan designed "to provide representation reflecting voting strength" (Brief of Appellees, at 32). In the 1972 election at issue in *Gaffney*, the Republicans received 52.88% of the votes in all the House races and 61.59% of the House seats, and 54.18% of the votes in all the Senate races and 63.88% of the Senate seats. (Brief for Appellees Theodore R. Cummings, *et al.*, at 36, *Gaffney v. Cummings*, 412 U.S. 735 (1973); Reply Brief for Appellant, at Chart I, *id.*) The plan which resulted in these seat-vote differentials was approved by the Court following the 1972 election, *id.* at 740, and was found to have allocated political power between the parties in accordance with their voting strength "within quite tolerable limits", *id.* at 754. These Connecticut differentials, however, average more than the seat-vote differential in the Indiana House which was relied upon by the court below as "most significant" (A-11).

Not only is this 1982 Indiana seat-vote differential within constitutional limits, but any differential at all on a district basis can be explained by factors other than partisan political gerrymandering. For example, in the three most populous counties, Marion, Lake and Allen, the total vote was much greater in 1982 where the Republicans won than where the Democrats won. The total vote for all candidates in House districts that elected Republicans and where at least a majority of the voters resided in one of these three

⁵ Actually, the 1982 Senate results show just the opposite. Using the lower court's figures, in 1982 the Democrats received approximately 53.1 percent of the statewide Senate vote and won thirteen of twenty-five, or 52 percent, of the races. (A-12) Since in a twenty-five seat election each seat represents a four percent gain, the 1982 Senate elections resulted in full proportional representation, as pointed out in Judge Pell's dissent (A-44).

counties⁶ was 1,025,533. Twenty Republicans won in these districts. Thus, the total vote per winning candidate (1,025,553 divided by 20) was 51,276.65. In these same three counties the comparable average total vote per Democratic winning candidate⁷ (10 in number) was only 32,301.90.⁸

Since it took the Republicans many more votes per winning candidate than it took the Democrats in these three counties, it would appear that the Democrats made more effective use of their votes in winning their seats, and that the Republicans "wasted" more votes to win their seats. This can be demonstrated by a simple example. If a candidate of party A in a two-party race wins by 51% when the total vote was 50,000 (25,500 votes) and a candidate of party B wins by 51% in another district where the total vote was only 30,000 (15,300 votes), party B wins one-half of the seats with less than one-half of the total votes in these two districts.

Thus, the "signal" seen by the court below in the overall seat-vote relationship in the 1982 election was misleading, and the lower court's reliance on it was misplaced. Seat-vote relationships are simply a poor indication in Indiana of partisan gerrymandering, and the court below ignored all the factors affecting legislative vote totals, including the personality of the candidates and the heavy Democrat districts which necessarily resulted from complying with the constitutional requirement that black voting strength be preserved, when the court leaped to its conclusion that there was unconstitutional gerrymandering because it saw a "signal" (A-11) in the seat-vote relationship.

⁶ Districts 15, 19, 20, 48, 49, 50 and 52. See Exhibit X, pp. 53, 54, 58.

⁷ Districts 11, 12, 13, 14 and 51. See Exhibit X, pp. 53, 58.

⁸ A greater number of votes per winning Republican candidate than per winning Democratic candidate is apparently a nationwide phenomenon. Ornstein, Genesis of a "Gerrymander", Wall St. J., May 7, 1985, at 39, col. 3 (eastern ed.).

III.

BLACK VOTERS, AS DEMOCRATS, PRESENT NO CONSTITUTIONAL CLAIMS

The Indiana NAACP State Conference of Branches (the "NAACP") filed no cross appeal from the judgment of the court below and therefore must accept the court's finding that blacks are not harmed by the Reapportionment Acts as blacks but only as Democrats (A-20-21). *Langnes v. Green*, 282 U.S. 531 (1930); *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52 (1926). Yet in its Brief the NAACP only repeats its argument, rejected by the court below, that the Reapportionment Acts unconstitutionally "fragment" black voting strength (Brief of NAACP, at 8, 9, 26) with particular reference to Marion County, which has a twenty percent black population and has three of fifteen, or twenty percent, black majority House legislative seats.

Black concentration of voters sufficient to permit black majority districts exists only in Marion and Lake Counties, and in these counties black majority districts exist in approximate proportion to black population (Exhibit 215, p. 2; A-127; Exhibit JJ pp. 22, 23). This is in sharp contrast to the two "fragmentation" cases cited in the NAACP Brief. In *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C. 1982), the black voters in Atlanta, Georgia, where racial polarization in voting was increasing, *id.* at 499, were denied a black majority Fifth Congressional district because "[t]he legislators knew a cohesive black community existed in south Fulton and Dekalb Counties, that it would take a 65% black population to allow a black electoral majority and that the Fifth District embodied in the final conference report divided the black community and prevented a black majority," *id.* at 515. The court stated it was not necessary that Georgia "maximize minority voting strength in the Atlanta area", but that it was not allowed to implement "a scheme designed to minimize black voting strength to the extent possible," *id.* at 518. In *Major v. Treen*, 574 F.Supp.

325 (E.D.La. 1983), the Louisiana legislature unlawfully diluted black voting strength in New Orleans by discarding a congressional redistricting plan which created a black majority district, *id.* at 332, because of the threat of a gubernatorial veto and substituting instead a plan which separated black voters to produce all white majority districts. This dilution of minority voting strength invalidated the act because it was employed in a racially polarized environment. The court stated:

The importance of polarized voting cannot be underestimated, for if it does not exist, the minority voter "has little reason to complain ..." *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 n.24, 97 S.Ct. 996, 1010 n.24, 51 L. Ed. 2d 229 (1977).

Id. at 351.

The NAACP argument that districts with less than a black majority remaining after black majority districts have been created in rough proportion to black voting strength are "fractured" unless black voting strength is maximized there as well, was rejected in *Gingles v. Edmisten*, 590 F.Supp. 345 (E.D.N.C. 1984), *prob. juris. noted sub nom. Thornburg v. Gingles*, 53 U.S.L.W. 3776 (Apr. 19, 1985).⁹ As reported in the supplemental opinion of the court, the black plaintiffs contended that the North Carolina plan "fractures substantial black population concentrations which, although insufficient in numbers and contiguity to constitute another voting majority, might nonetheless exercise considerable voting power as a substantial voting minority in one at least of appropriately

⁹ In former North Carolina House district number 36 blacks constituted 26.5% of the total population and, in reapportionment, this district was divided into eight single member districts. Two of these eight single-member districts had black majority populations. 590 F.Supp. at 378. In other words, black majority districts comprised 25% of the total number of new districts, and blacks comprised 26.5% of the total population. As in Indiana, the black majority districts, where permissible, are roughly proportional to the total black population.

constructed single-member districts". The plaintiffs also claimed that the plan contained districts "so irregularly shaped that voters assertedly will not be able to learn in which district they live so to be able to use their votes effectively". 590 F.Supp. at 379. The plaintiffs presented a plan which would have created a district with a 44.7% black population in a "packed" district compared to 28.2% of the population in the district with the largest black concentration outside the two black majority districts under the state's plan approved by the court. *Id.* at 380. The court held, however, that no "fracturing" or "packing" in violation of Section 2 of the Voting Rights Act had occurred, reasoning that the application of this concept to districts with less than black majorities lacks any rational basis, only "raw intuition". *Id.* at 381.

Therefore, *Gingles* holds that there is no fracturing of a black concentration of voters where the blacks are less than a majority even where there has been racial bloc voting. Not only is there no evidence or finding of any racial bloc voting in Indiana, there is no evidence or finding that blacks residing in multimember districts in which they were a minority and represented by white Republican legislators fared any worse than white Democrats residing in the same district.¹⁰

For these reasons the blacks as Democrats present no constitutional claims. Quite simply, blacks are fully and fairly represented in Indiana.

¹⁰ The undisputed evidence is that in every bill where the so-called "black position" was defeated, the vote was along party lines and that where the so-called "black position" won the vote was not along party lines (November Transcript pp. 124-25). Republicans, whether from multi-member districts or single member districts, voted for white-Democrat sponsored legislation in approximately the same percentage that they voted for black-Democrat sponsored legislation (see Exhibits A-D, S and T).

IV.

DEMOCRATS ARE NOT A "SUSPECT CLASS" UNCONSTITUTIONALLY DEPRIVED OF THEIR VOTES

In an unfortunate muddling of the issues in this case, the Democrats claim they are deprived of their fundamental right to vote, (Brief of Appellees, at 19 n.19) and liken this case to ballot access cases and cases in which membership in a political party results in loss of a job or other rights and privileges. Such a characterization is misleading and trivializes the needs of true "insular" minorities for constitutional protection.

The right to vote is indeed a fundamental right. State action infringing that right is therefore subject to strict scrutiny. The fundamental "right to vote," however, is merely the numerical, or quantitative, right to vote. This right to vote is guaranteed to racial groups under the Fifteenth Amendment, and to all groups under the Fourteenth Amendment. Unlike the quantitative right to vote, however, the qualitative right to vote, or a right against vote dilution, is provided under the Fourteenth Amendment only if a suspect class, particularly a racial or ethnic group, is affected.

In 1973 this Court for the first time upheld a vote dilution claim in *White v. Regester*, 412 U.S. 755 (1973), *aff'g in part Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972). It said it would entertain claims that electoral systems "are being used invidiously to cancel out or minimize the voting strength of racial groups." *Id.* at 765. It therefore affirmed a finding that multimember districts in Dallas County, Texas discriminated against blacks.¹¹ Obedient to *White*,

¹¹ It also affirmed a finding that Bexar County's multi-member district discriminated against Mexican-Americans, but only after carefully noting that "the District Court considered the Mexican-Americans in Bexar County to be an identifiable class for Fourteenth Amendment purposes." 412 U.S. at 767; *cf. Graves v. Barnes*, 343 F. Supp. 704, 727-29 (W.D. Tex. 1972) ("Chicanos, as well as Blacks, require the protective intervention of the Federal courts").

the lower courts opened their doors to claims of racial vote dilution, particularly the southern courts in the Fifth Circuit. *E.g.*, *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). They remained closed, however, to such claims by political groups. For example, in *Jimenez v. Hidalgo County Water Improvement District No. 2*, 68 F.R.D. 668 (S.D. Tex. 1975), *aff'd mem.*, 424 U.S. 950 (1976), the court held that only racial groups could attack gerrymandering. *Id.* at 673-74.

Similarly, in *Mirrione v. Anderson*, 717 F.2d 743 (2d Cir. 1983), the plaintiff argued that a reapportionment intended to improve black and Hispanic voting power diluted his voting strength and that of other residents of the Rosedale community in New York City. The trial court dismissed his complaint, and the appellate court affirmed, noting that "members of a community have no claim to be left together in one district at least absent a showing of discrimination on grounds of race or color." *Id.* at 745 (quoting *United Jewish Organizations of Williamsburgh, Inc. v. Wilson*, 510 F.2d 512, 521 (2d Cir. 1975), *aff'd on other grounds sub nom. United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977)).

The Fourteenth Amendment "intent" requirement has proved particularly troublesome in the vote dilution area. This question was largely resolved by the Court in *Rogers v. Lodge*, 458 U.S. 613, 624-26 (1982), where it held that the history of discrimination against a racial group, its depressed socio-economic status, and unresponsive and discriminatory actions of government officials are all relevant to proving that an electoral system has a discriminatory purpose.

Indeed, in setting up its list of racially tailored factors, *Rogers* stated the constitutional constraints on multimember districting in strictly racial terms:

[T]his Court has repeatedly held that multimember districts are not unconstitutional *per se*. The Court has recognized, however, that multimember districts

violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial ... discrimination" by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population.

458 U.S. at 637, (emphasis and ellipsis in original, citations omitted). Justice Steven read this passage as holding that only racial groups could object to vote dilution. He dissented in part because he disagreed that the racial character of the minority should be of critical importance. *Id.* at 651-53 (Stevens, J., dissenting).

There is every reason to deny judicial review to the vote dilution claims of these Democrats. They simply are not a suspect class.

[They] have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973) (residents of less wealthy school districts not a suspect class).

The Democrats cannot make the type of showing that the racial cases require. The required proof is stringent. The question turns not merely on the number of representatives a majority is able to elect; it involves many other factors, which together tend to show that *the minority has been intentionally fenced out from effective participation in the political process*. The Democrats would have to demonstrate that in Indiana they have even less access to the process than did blacks in Mobile, Alabama. *Cf. Mobile v. Bolden*, 446 U.S. 55 (1980) (reversing a finding that an at-large voting system unconstitutionally diluted black voting strength). Such a showing would be impossible.

This pattern of exclusion must be far more stark and pervasive than the Democrats could possibly show.¹² Democrats have never been subject to societal discrimination in the way that blacks have. Almost by definition, Democrats are able to work through the political process. They belong to a political party of enormous wealth and influence. There is no impediment to Democrats registering to vote, fielding agreeable candidates, or serving on grand juries. Democrats' roads are paved. They have ample opportunity to make known their views and to attempt to form coalitions or to win others over to their cause. In short, Democrats lack any quality that would call for extraordinary judicial intervention in the majoritarian system. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-43 n.4 (1938).

The factors to be considered clearly aim at protecting only the genuinely oppressed minority, not a minority party complaining because in a representative democracy the majority party tends to win elections. One of the two key parties in the two-party system *per se* can never show the degree of fencing out necessary to show a constitutional violation. The spectacle of Democrats seeking to cloak themselves in protections tailored to victims of racist oppression would be amusing, if it did not threaten to impinge on the constitutional protections already afforded racial and ethnic minorities by this Court.

¹² Even under the Stevens-Powell analysis, a political gerrymander is unconstitutional only if it is egregious. *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2675-76, 2690 (1983). It cannot be the rule that the mere influence of partisan or political considerations in formulating a reapportionment is sufficient to invalidate it. See *Rogers v. Lodge*, 458 U.S. 613, 648-49, (1982) (Stevens, J., dissenting). "[P]olitical considerations, even partisan ones, are inherent in a democratic system." *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2689 (1983) (Powell, J., dissenting).

CONCLUSION

In the present case the Democrats and the NAACP as Democrats seek to invoke the very "right" of group representation which was rejected in *Whitcomb v. Chavis* and to accomplish this by the creation of arbitrary "bright line" tests where no manageable standards exist. This Court should not, however, abandon its prior holdings at the Appellees' call for judicial legislation. The Indiana Reapportionment Acts allow the Democrats to compete fairly for legislative seats and to win control of the Indiana legislature. As such they are constitutional. For the reasons discussed herein and in Appellants' prior brief, this Court should reverse the order of the court below and vacate the injunction.

Respectfully submitted,

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APPENDIX

HOUSE OF REPRESENTATIVES "COMPETITIVE" SEATS

Winning Candidate	District	% Democrat	
		based on 1982 State Auditor's Race (A-121)	% Democrat based on 1982 election results (JA-39)
Kiely (R)	36	54.6%	41.3%
Schuck (D)	30	54.0%	52.9%
Underwood (D) ...	55	53.8%	56.2%
Cook (D)	17	53.6%	65.8%
Bowser (D)	9	53.6%	58.4%
Budak (R)	9	53.6%	43.0%
Price (D)	5	53.2%	53.2%
Marshall (D)	69	53.2%	56.2%
Tincher (D)	46	51.1%	53.1%
Goble (D)	67	51.0%	100.0%
Espich (R)	32	50.4%	38.6%
Schultz (D)	61	50.2%	57.3%
Wilson (D)	10	50.2%	52.6%
Ayres (R)	10	50.2%	44.2%
Hibner (R)	56	50.1%	41.0%
Hoover (R)	33	50.1%	46.8%
Dean (R)	62	49.9%	44.8%
Coleman (R)	54	49.6%	40.8%
Becker (R)	75	49.3%	41.5%
Avery (D)	75	49.3%	59.6%
Duckwall (R)	31	49.3%	48.2%
Turner (D)	31	49.3%	51.7%
Thomas (R)	44	49.1%	39.6%
Moberly (R)	57	48.7%	0%
Taylor (R)	8	48.1%	47.9%
McIntyre (R)	65	47.7%	40.5%
Klinker (D)	27	47.7%	52.4%
Fifield (R)	15	47.6%	42.2%
Reppa (R)	15	47.6%	40.5%
Stephan (R)	21	47.1%	49.3%
Jontz (D)	25	46.4%	61.1%
Bales (R)	60	46.3%	43.1%
Mangus (R)	6	45.9%	46.5%
Becker (R)	24	45.6%	46.0%
Engle (R)	20	45.2%	41.9%
Pond (R)	20	45.2%	40.3%
Worden (R)	20	45.2%	44.1%
Hayes (D)	59	45.2%	51.8%
Regnier (R)	29	45.1%	44.4%
		Totals	26 6

* — districts in which vote percentages for State Auditor's race and House race varied by 3% or more

** — districts which would have elected a Democrat if the Democratic candidate had run as well as the Democratic candidate for State Auditor

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,
Appellants,

VS.

IRWIN C. BANDEMER, *et al.*,
Appellees.

Appeal from the United States District Court
for the Southern District of Indiana

AMICUS CURIAE BRIEF OF THE SENATE OF THE STATE OF CALIFORNIA IN SUPPORT OF BRIEF OF APPELLANTS

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No. 84-1244

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SUSAN J. DAVIS, *et al.*,
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*Appellees.*Appeal from the United States District Court
for the Southern District of IndianaAMICUS CURIAE BRIEF OF THE SENATE OF
THE STATE OF CALIFORNIA IN
SUPPORT OF BRIEF OF APPELLANTS

In accordance with Rule 36.2 of the *Rules of the Supreme Court of the United States*, the Senate of the State of California (hereinafter the "California Senate") submits this brief, as *amicus curiae*, in support of appellants' appeal from the decision of the United States District Court for the Southern District of Indiana in *Bandemer v. Davis*, Cause Nos. IP 82-56-C and IP 82-164-C.¹

¹By letters submitted herewith, all parties to the case have consented to the filing of this *amicus curiae* brief by the California Senate.

I

STATEMENT OF INTEREST OF AMICUS CURIAE.

Amicus is the duly elected and constituted Senate of the State of California and, along with the Assembly of the State of California, has the primary responsibility for reapportioning California's forty-five (45) Congressional districts, eighty (80) Assembly districts, and forty (40) Senate districts. The California Senate files this *amicus* brief because the decision of the district court in *Bandemer v. Davis*, if allowed to stand, will have a substantial impact far beyond the borders of Indiana and will likely trigger protracted litigation in virtually every state in the Union. California, in particular, has already suffered through nearly four and one-half years of bitter litigation stemming from its most recent reapportionment, and faces the almost certain probability of further litigation in the wake of the *Bandemer* decision — litigation which could very well extend through the end of the decade.

II

SUMMARY OF CONTENTIONS.

The California Senate urges this Court to reverse the decision of the district court below, on the following grounds:

A. The decision of the district court runs directly contrary to established law on the issue of the justiciability of claims of political or partisan gerrymandering, as articulated by numerous decisions of this Court and of various circuit courts of appeals.

B. The decision of the district court fails to articulate judicially manageable standards for reviewing claims of political gerrymandering, and indeed, a review of the specific factors focused upon by the district court (statistical analyses and the configuration

of electoral districts) clearly demonstrates that judicially manageable standards for the review of such claims are incapable of judicial articulation. As a result, claims of political gerrymandering should continue to be considered nonjusticiable.

C. The decision of the district court, if allowed to stand, will have a substantial and continued impact throughout the country and will no doubt result in numerous state and federal courts being dragged unnecessarily into the "political thicket" of vast and inconclusive reapportionment litigation, while state legislators will be transformed into professional litigants unable to devote significant time to their legislative duties.

III

THE DECISION OF THE DISTRICT COURT IS CONTRARY TO ESTABLISHED LAW.

The district court's decision in *Bandemer* is in clear conflict with previous decisions of this Court, the Seventh Circuit Court of Appeals, and courts of appeals from various other circuits. This conflict has been thoroughly briefed by appellants and by various other *amici*, and it is sufficient simply to note that, insofar as the decision purports to recognize the justiciability of a claim for political gerrymandering, that decision is contrary to established law as articulated by cases including *Jiminez v. Hidalgo County Water District No. 2*, 424 U.S. 950 (1976);² *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973); *YMCA v. Lomenzo*, 382 U.S. 4 (1965); *Russo v. Vacin*, 528 F.2d 27

²Although issued as an affirmance without further opinion, the *Jiminez* decision is a decision on the merits and thus has precedential value. (E.g., *Meek v. Pittenger*, 421 U.S. 349, 367 n.16 (1975); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974).)

(7th Cir. 1976); and *Cousins v. Chicago City Council*, 466 F.2d 830 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972).³

IV

CLAIMS OF POLITICAL GERRYMANDERING ADMIT OF NO JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS FOR REVIEW AND HENCE SHOULD CONTINUE TO BE CONSIDERED NON-JUSTICIABLE.

It has long been recognized that claims of constitutional violations are to be considered nonjusticiable "political questions" where there is "a lack of judicially discoverable and manageable standards for resolving [such claims]". (*Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also Coleman v. Miller*, 307 U.S. 433, 454-55 (1939) (justiciability depends on existence of "satisfactory criteria for judicial determination").)

As the *Baker* decision teaches, the question of justiciability depends in large measure upon "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded". (*Baker*, 369 U.S. at 198.) It is submitted that such tasks, while often difficult, take on near herculean proportions when a court is confronted with claims of political or partisan gerrymandering.

³Inasmuch as these cases have been thoroughly briefed, the California Senate will not devote considerable space to reviewing the previous decisions but will instead confine itself to arguing that there are compelling practical reasons for continuing to treat claims of political gerrymandering as nonjusticiable. Chief among these reasons, as articulated hereinbelow, is the fact that claims of political gerrymandering admit of no judicially discoverable and manageable standards by which they may be properly evaluated.

A. Precise Identification Of The Allegedly Disfavored Class Of Voters Is Impossible In A Political Gerrymandering Case.

A threshold inquiry in any equal protection analysis is the identification of a specific class of individuals which has been singled out for discriminatory or unequal treatment. In this regard, the decision of the court below treats the *political preference* of voters in a single election as a status equivalent to membership in a *racial or ethnic minority*, and thus finds such "political groups" to be entitled to the same protections long accorded racial or ethnic minorities.

Simply stated, however, there are fundamental dissimilarities between membership in an identifiable racial or ethnic group, on the one hand, and an individual's one-time voting preference, on the other hand. These important distinctions preclude treating claims of political gerrymandering in the same manner as claims of racial or ethnic gerrymandering.

The lower court identified, as the class supposedly placed in a disfavored position under the apportionment plans adopted by the Indiana Legislature, *those persons who cast votes for Democratic Party candidates in the 1982 Indiana House and Senate elections*. Unlike members of racial or ethnic minorities, however, members of such a "political group" do not share any "immutable" characteristic which is capable of subjecting members of the group to legal or social stigma. (*Compare Plyler v. Doe*, 457 U.S. 202 (1982) (status as undocumented alien *not* an immutable characteristic); *Parham v. Hughes*, 441 U.S. 347 (1979)); *with Gomez v. Perez*, 409 U.S. 535 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Oyama v. California*, 332 U.S. 633 (1948) (holding, respectively, that *illegitimacy*, *alienage*, and *national origin* do constitute such immutable characteristics).)

Similarly, members of such political groups, unlike members of racial or ethnic minorities, cannot point to any

history of purposeful discrimination impeding their ability to participate in the political process. (*See United States v. Carolene Products*, 304 U.S. 144 (1938).) Thus, these traditional bases for special protection are not implicated by a claim of partisan gerrymandering.

Nor do persons who cast votes for Democratic candidates in the 1982 Indiana House and Senate elections constitute members of a "discrete and insular minorit[y]" entitled to, or in need of, special protection. (*Carolene Products*, 304 U.S. at 153 n.4.) Rather, precisely the opposite is true — membership in a particular political party or political group is *highly transitory*. Individuals may, and often do, change party affiliation and, even if they do not, party affiliation does not guarantee that they will vote for candidates fielded by their party. Rather, Americans are notorious for *crossing party lines* in order to cast their ballots for candidates who, although affiliated with other parties, are considered to be more attractive or more qualified than their opponents.

As a result, a federal court attempting to evaluate a partisan gerrymandering claim cannot, with any degree of precision, *even attempt to identify the supposedly disadvantaged class*, either by reference to political registration or to the percentage of ballots cast for candidates fielded by that party. For this reason, it simply cannot be argued that "the duty asserted [by parties alleging partisan discrimination] can be judicially identified" and, for this reason, claims of political gerrymandering should continue to be recognized as nonjusticiable. (*Baker*, 369 U.S. at 198.)⁴

⁴Other difficulties in identifying the relevant "political groups" entitled to special protection were pointed out by this Court in *Mobile v. Bolden*, 446 U.S. 55 (1970). There, the Court noted that the notion of a constitutional right to proportional representation for political groups at the municipal level raised "preliminary questions [which] may be largely unanswerable", including such questions as:

B. Nor Can Judicially Manageable Standards Be Articulated To Assess Whether A "Political Gerrymandering" Has Actually Taken Place.

As noted, claims of political gerrymandering present a *preliminary* problem of justiciability for the simple reason that members of the supposedly disfavored class cannot be identified with any degree of certainty. Assuming, however, that an identifiable political group entitled to constitutional protection could be clearly defined, a *second* justiciability problem is presented by the fact that the conduct of a state legislature which is claimed to unlawfully disfavor this group cannot be measured against the required "judicially discoverable and manageable standards". (*Baker*, 369 U.S. at 217.)

Claims of "political gerrymandering" arising from the apportionment of a state's electoral districts have long been considered nonjusticiable primarily because the apportionment process has been correctly perceived as a "political thicket" into which courts should not lightly step. (*Colegrove v. Green*, 328 U.S. 549, 556 (1946).) As a result,

Can only members of a minority of the voting population in a particular municipality be members of a "political group"? How large must a "group" be to be a "political group"? Can any "group" call itself a "political group"? If not, who is to say which "groups" are "political groups"? Can a qualified voter belong to more than one "political group"? Can there be more than one "political group" among white voters (e.g., Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one "political group" among nonwhite voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the size of its governing body? Upon its form of government? Upon its history? Its geographic location?

(446 U.S. at 78 n.26.) These questions become even more difficult to address when courts are asked to identify "political groups" among *state-wide* pools of voters.

reapportionment has long been considered a task best left to the legislatures of the various states *and best left alone, wherever possible, by the federal judiciary.* (E.g., *Reynolds v. Sims*, 377 U.S. 533, 586 (1964); *Gaffney*, 412 U.S. at 749-51 (courts should not seek to improve upon constitutionally sufficient apportionment plans).)

While this Court in *Baker* and its progeny did choose to enter the "political thicket", and ultimately concluded that claims of *significant population disparities* among legislative or congressional districts *did* present a justiciable controversy under the Fourteenth Amendment, *it did not do so until it was able to articulate perhaps the paradigm example of a "judicially discoverable and manageable standard[]"* — the requirement of "*one person, one vote*". Application of this requirement, first enunciated in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), and made applicable to the apportionment of state legislative bodies by *Reynolds*, 377 U.S. at 568, and related cases, is elegant in its utter simplicity.

All that a court considering claims of unconstitutional population disparities need do is to ascertain and compare the population figures for the various electoral districts and ensure that each elector has been given the opportunity to cast a vote equal in strength to that cast by his or her fellow electors. Simple arithmetic is all that is needed. The ease with which this particular constitutional standard may be applied thus provides *a well marked and easily travelled pathway through the otherwise impassable "political thicket"*, and allows a federal court to act with confidence in its ability to identify *and* rectify situations in which the dictates of the equal protection clause have been ignored.⁵

⁵Indeed, Justice Stevens has emphasized that the prime significance of the "one person, one vote" standard, as developed in the years since *Baker*, stems in large part from the fact that this particular constitutional guideline "attache[s] no significance to the

By contrast, claims of political gerrymandering *cannot* be evaluated by reference to similarly discoverable or manageable judicial standards. In fact, the decision of the *Bandemer* court itself demonstrates the lack of sufficient standards with which to ascertain whether a political gerrymander has indeed taken place. Neither the *statistical analysis* employed by the district court nor *its focus upon the size and shape of specific districts* can provide standards sufficiently specific to allow future courts to identify and rectify specific acts of claimed political gerrymandering.

1. The Statistical Analysis Employed in *Bandemer* Does Not Provide A "Judicially Manageable Standard".

Despite purportedly disavowing any notion that proportional representation for political parties is required under the Constitution (a conclusion too well established to be questioned at this point), the *Bandemer* court nevertheless used its "finding" of a lack of proportional representation for Indiana Democrats as the springboard to its eventual conclusion that an unconstitutional political gerrymander had occurred.⁶ Thus, in branding the reapportionment of the Indiana House and Senate a "political gerrymander", the district court placed primary emphasis upon statistics showing that, *although Democratic candidates received 51.9% of all votes cast in the Indiana House*

subjective intent of the decisionmakers who adopted or maintained the official rule under attack". (*Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 3285 (1982) (Stevens, J., dissenting).)

⁶It cannot be too strongly emphasized that no minority group, whether it be *racial, ethnic, or political*, is constitutionally entitled to proportional representation in any state legislature. (E.g., *Mobile v. Bolden*, 446 U.S. at 78-79; *United Jewish Orgs. v. Carey*, 430 U.S. 144, 166-67 (1976); *White v. Regester*, 412 U.S. 755, 765-66 (1973); *Wright v. Rockefeller*, 376 U.S. 52 (1964).)

elections, Democrats were elected to only 43 of the 100 seats in that body.⁷

The majority found that this statistical discrepancy created, at the very least, a *prima facie* case of discrimination, requiring substantial scrutiny of the specific details of the challenged plans and placing the burden of justifying *each* particular district configuration *on the state*. However, it is submitted that such blind reliance upon potentially misleading statistical analyses cannot provide the "judicially discoverable and manageable standards" necessary to evaluate claims of political gerrymandering.

Indeed, Judge Pell, in dissent, suggested an alternative statistical approach focusing, not on the often hotly contested Senate and House races reviewed by the majority, but instead on *low visibility races* in which, according to researchers, candidate personalities are often *less important than straight party affiliation* in determining the outcome.⁸ Utilizing this approach, which Judge Pell suggests provides a more accurate measure of the partisan voting

⁷Although the very same statistical analysis, when applied to the Indiana Senate elections, showed that Democratic candidates for the Senate received approximately 53.1% of the vote, and had elected 13 of the 25 State Senators (i.e., 52% of the State Senate), the *Bandemer* court found, for some inexplicable reason, that the *Senate reapportionment also constituted an unconstitutional political gerrymander*.

⁸Thus, Judge Pell reviewed past races for State Auditor, Clerk of the Supreme Court and Court of Appeals, and the Reporter of the Supreme Court and Court of Appeals, all low-profile races in which the determining factor in voter selection is more likely to be *party affiliation* than candidate personality. Such an approach is considered by researchers who have studied the issue to provide a more reliable method for ascertaining party voting strength. (See Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Minn. L. Rev. 1121, 1131 (1978).)

strength of the majority and minority parties, Democratic voting strength in Indiana was estimated to be *46.8 percent*, rather than the *51.9 percent* figure identified by the majority.

Applying this figure to the results of the 1982 Indiana House and Senate elections, Judge Pell then found that the Democrats did win slightly fewer House seats than might have been expected by reference to their base voting strength, *but nevertheless won more seats in the Senate than would have been expected* — winning, indeed, a *majority* of those seats. Judge Pell concluded, on this basis, that the disproportionate results in the Indiana House could *not* be considered to have resulted from purposeful discrimination or political gerrymandering by the Republican majority.

While the statistical analysis employed by Judge Pell may or may not be considered to enjoy greater empirical validity than the analysis employed by the majority, this is not the critical point; rather, what is important is the fact that different analytical approaches, based upon competing statistical analyses *designed to measure the same basic characteristic* — partisan voting strength — *led to wholly contradictory conclusions*.⁹ This conflict merely exempli-

⁹Indeed, the same researchers who suggested the alternative analysis employed by Judge Pell have noted that such statistical analyses suffer from severe flaws in general:

[This statistical] approach fails to account for the fact that the difference between percentage of vote and number of seats captured may in fact be the result of natural advantages — the inordinate concentration of partisans in one place — rather than any deliberate partisan districting scheme. For example, it is well known that Michigan Democrats are heavily concentrated in Detroit but are in a minority in many other parts of the state.

(Backstrom, Robins & Eller, 62 Minn. L. Rev. at 1127.) The authors go on to point out that, although Detroit Democratic candidates will generally win their elections, the *excess* votes cast in these

fies a fact which is well known among researchers — statistical analyses may be manipulated to reach a variety of different conclusions, some of which are completely contradictory.¹⁰ More importantly, however, the contradictory factual conclusions reached by the majority and the dissent in *Bandemer* clearly point up the *complete lack of “judicially discoverable and manageable standards”* with which claims of partisan gerrymandering may be evaluated and decided.

Future courts faced with the task of identifying and rectifying alleged political gerrymanders will not be able to test such claims by reference to a simple constitutional yardstick such as the “one person, one vote” standard used in *Baker* and *Reynolds*, but will instead be inundated with conflicting statistical analyses, yielding contradictory results, even with regard to the preliminary question of whether there has been a disproportionate *impact* upon the minority party. As in *Bandemer*, the minority party will invariably be able to present statistics indicating a *lack* of proportional representation, while the majority party will invariably be able to present similar statistical analyses suggesting a *contrary* conclusion.

areas will be “wasted” and it will appear, in a blind statistical analysis of Michigan elections, that Democratic voters have been discriminated against in the construction of electoral districts.

¹⁰Federal courts too are well aware of the potentially misleading nature of statistical analyses, especially when used as evidence of purposeful discrimination. As stated in *Hester v. Southern Ry. Co.*, 497 F.2d 1374, 1381 (5th Cir. 1974), an action brought under Title VII of the Civil Rights Act of 1964:

We recognize that statistics are a powerful tool in the hands of a Title VII plaintiff, but we are also aware that undue emphasis on their use *may obscure rather than advance the judicial process.* (Emphasis supplied, footnote omitted.)

(See also *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977); *New Jersey Welfare Rights Org. v. Cahill*, 483 F.2d 723, 727 (3d Cir. 1973).)

Given that the statistical analyses employed by the *Bandemer* court do not provide manageable standards for review, litigation involving such claims is likely to degenerate into protracted and inconclusive factual disputes, and different results may obtain in different jurisdictions despite similar sets of facts. Courts attempting to evaluate claims of partisan discrimination under this approach will thus be left to flounder in the “political thicket” and become “bogged down in a vast apportionment slough”. (*Gaffney*, 412 U.S. at 750.)

2. The Statistical Approach Employed By The District Court Provides No Guidance For Legislatures Engaged In The Task Of Reapportionment.

A second problem arising from the lower court’s focus upon the 1982 election results is the fact that this approach cannot possibly provide any guidance to a state legislature engaged in reapportionment. *A fortiori*, future election results will not be available until *after* the task of reapportionment has been completed. State legislators will thus be left to rely only upon party registration statistics, as available *at the time of reapportionment*.

However, such statistics have proven to be notoriously poor predictors of election results for various reasons, including candidate personalities, shifting political tides, variable voter turnout, current issues of particular primacy, cross-over voting, and the “coattail” effect which often accompanies the election of a popular presidential or gubernatorial candidate. Past election results likewise constitute a poor predictor of future elections for similar reasons.¹¹

¹¹As stated in *Wells v. Rockefeller*, 311 F.Supp. 48, 51-52 (S.D. N.Y.), *aff’d mem.*, 398 U.S. 901 (1970):

Recent election figures ... are only indicative of the voters’ reaction to a particular candidate. ... Plaintiff’s approach of a fixed Republican-Democrat society ignores the all-important factors, amongst others, of the candidate’s personality, the

As a result, it is possible that a legislature might promulgate a reapportionment plan designed to insure proportional representation for all political parties, based upon voter registration statistics, but that the election results nevertheless show a definite skewing in favor of the majority party. Under the approach adopted by the district court, such a result, though *wholly unintended*, would establish at least a *prima facie* case of partisan gerrymandering and would shift the burden of justifying every single aspect of the challenged plan to the state. Given the multitude of factors which may be taken into consideration by a legislature reapportioning a state's electoral districts (as discussed in greater detail *infra*), this approach would place an incredible burden on the state — a burden it might not be able to carry even though no *intent* to discriminate ever existed.¹²

Because the statistical approach utilized by the district court focuses upon post-apportionment election results, it cannot provide guidance to state legislatures engaged in the already complex task of reapportionment and, perhaps more importantly, will not allow a court to differentiate between a purposeful gerrymander and situations in which disproportionate election results are the wholly unintended

public's conception of his ability and integrity and the current issues which he may espouse, or offer to espouse, on behalf of his constituents.

¹²Similarly, the results of an *initial* election may be found to be in statistical accord with partisan voting strength, as measured by the district court in *Bandemer*, but *subsequent elections* may exhibit some skewing of the results in favor of the majority party. Would such an event be viewed as indicative of a partisan gerrymander, or should such disproportionate results in a *second tier election* more appropriately be attributed to shifting political alignments, candidate personalities, or the vagaries of individual elections? The statistical approach employed by the district court simply cannot provide an answer to this question.

result of decisions made to foster legitimate state goals or to address legitimate state concerns. Reliance upon statistical analyses thus does not, and cannot, provide a judicially manageable standard for identifying alleged political gerrymanders, and such an approach should therefore be rejected.

3. The Shape And Size Of Districts And Related Factors, As Employed By The *Bandemer* Court, Do Not Provide Judicially Manageable Standards For Ascertaining Intent.

After determining, by its statistical analysis, that the minority party had been unable to achieve proportional representation in the Indiana Legislature, the *Bandemer* court then reviewed the *shapes* of the districts involved, placing special emphasis upon a perceived lack of *compactness and contiguity*, and concluded that there had been intentional discrimination against voters who wished to cast their ballots for candidates fielded by the Democratic Party. However, as with its reliance upon statistical analyses, these amorphous concepts related to district configurations simply cannot be utilized to frame standards sufficiently precise to differentiate between purposeful gerrymanders and apportionment plans which, though not deliberately discriminatory, nevertheless may have some disproportionate *impact* on the minority party.¹³

Initially, it must be noted that this Court has already refused to hold that compactness should constitute an

¹³As previously noted (*see* footnote 6, *supra*), no group, whether it be racial, ethnic, or political, is entitled to proportional representation. Rather, even if claims of political gerrymandering are to be recognized as justiciable, a clear discriminatory *intent* to dilute the voting strength of the minority political party must be demonstrated before relief can issue from the court. As argued in the text, this inquiry into *motive* also admits of no judicially discoverable or manageable standards.

independent constitutional requirement. (*Gaffney*, 412 U.S. at 752 n.18.) Perhaps more importantly, however, state and federal courts alike have long recognized that reapportionment is an essentially legislative function best left to the wisdom of a state's elected officials and that state legislatures are to be given wide latitude in identifying and giving effect to various concerns in this process. (*Reynolds*, 377 U.S. at 586.)

For example, in addition to the *required* focus on equality of population among districts, factors as diverse as the compactness and contiguity of districts,¹⁴ respect for political, economic, and geographic communities of interest,¹⁵ the avoidance of contests between incumbents,¹⁶ the enhancement of minority participation in the electoral process,¹⁷ respect for city and county boundaries,¹⁸ as well as

¹⁴*Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964); *Mader v. Crowell*, 498 F.Supp. 226 (M.D. Tenn. 1980); *Legislature v. Reinecke* ("Reinecke IV"), 10 Cal.3d 396, 411 (1973); *see also Wyche v. Madison Parish Police Jury*, 653 F.2d 1151 (5th Cir. 1981); *Cousins v. Chicago City Counsel*, 466 F.2d 830 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972) (indicating that court-ordered apportionment plans should attempt to create compact and contiguous districts).

¹⁵*NAACP v. Gadsden County School Board*, 589 F.Supp. 953 (N.D. Fla. 1984); *Terrazas v. Clements*, 581 F.Supp. 1329 (N.D. Tex. 1984) (cautioning against fragmentation of minority communities of interest); *McBride v. Mahoney*, 573 F.Supp. 913, 915 (D. Mont. 1983); *Reinecke IV*, 10 Cal.3d at 412.

¹⁶*White v. Weiser*, 412 U.S. 783, 791 (1973); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966); *Gingles v. Edmisten*, 590 F.Supp. 345, 382 (E.D.N.C. 1984); *Cosner v. Dalton*, 522 F.Supp. 350, 360 (E.D. Va. 1981).

¹⁷*See Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 2664 (1983); *Rome v. United States*, 446 U.S. 156, 185 (1980); *Ketchum v. Byrne*, 740 F.2d 1398, 1407 (7th Cir. 1984).

¹⁸*Mahan v. Howell*, 410 U.S. 315 (1973); *Reynolds*, 377 U.S. at 580-81; *McBride v. Mahoney*, 573 F.Supp. at 915; *Cosner v. Dalton*, 522 F.Supp. at 360-61; *Reinecke IV*, 10 Cal.3d at 412.

basic geographic regions,¹⁹ the availability and ease of transportation within districts,²⁰ and the flexibility afforded by the use of multi-member districts,²¹ to name but a few, have been recognized as proper considerations which may legitimately be taken into account in the reapportionment of a state's electoral districts. Indeed, many state legislatures are *required*, by state law, to utilize one or more of these factors as guidelines in fashioning new apportionment plans.²²

Moreover, it has also been recognized that, because changes in the boundaries of one district require concomitant changes in adjacent districts in order to equalize the

¹⁹*Reinecke IV*, 10 Cal.3d at 412.

²⁰*Karcher*, 462 U.S. 725, 103 S.Ct. at 2674 n.20 (Stevens, J., concurring); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Reinecke IV*, 10 Cal.3d at 411.

²¹*Reynolds*, 377 U.S. at 579; *White v. Regester*, 412 U.S. 755, 765 (1973), and cases cited therein.

²²For example, Article XXI of the California Constitution provides that:

In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts in conformance with the following standards:

(a) Each member of the Senate, Assembly, Congress, and the Board of Equalization shall be elected from a single-member district.

(b) The population of all districts of a particular type shall be reasonably equal.

(c) Every district shall be contiguous.

(d) Districts of each type shall be numbered consecutively commencing at the northern boundary of the state and ending at the southern boundary.

(e) The geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section.

populations of these districts, the use of one criteria in constructing any particular district may have far ranging effects on the configuration of other districts. As stated by the California Supreme Court in *Legislature v. Reineke*, 10 Cal.3d 396, 418 n.18 (1973): "Any person with even a passing acquaintance with reapportionment becomes aware of what is known as the 'ripple effect', whereby the casting of one district on the water produces ripples felt throughout the state." (See also *McBride v. Mahoney*, 573 F.Supp. 913, 916 (D. Mont. 1983); *Burton v. Hobbie*, 561 F.Supp. 1029 (M.D. Ala. 1983).)

By virtue of this "ripple effect", the construction of one particular district to effectuate one particular legislative concern (for example, the adjustment of district boundaries to coincide with the unique topography of the area or the boundaries of a political subdivision) will necessarily alter the shapes of districts many miles removed, causing, perhaps, significant deviation from the theoretical ideals of compactness and contiguity. In a state as large and geographically and demographically diverse as California (which ranges from sparsely populated desert and mountain regions, through rural farming communities, to industrial centers and the densely populated coastal cities), the "ripple effect" will have a significant impact on district configurations far removed from the originally constructed district.²³

Despite the fact that each of the considerations listed above, and others, have been judicially recognized to constitute appropriate factors to be taken into consideration in the reapportionment process, the approach employed by

²³Again as explained by the California Supreme Court, the ripple effect, "[i]f uncontrolled, . . . may result in the initial choice of a perfect district in one place leading to intolerably imperfect districts elsewhere". (*Reinecke IV*, 10 Cal.3d at 418 n.18.)

the district court in *Bandemer* would lead to an intolerable situation in which a state legislature, *whenever it chose to favor one such consideration over another, would invite a legal challenge to the reapportionment plan involved*. For example, were a state legislature to conclude that city and county boundaries or considerations of contiguity and compactness should be disregarded where necessary to leave intact certain geographic or political communities of interest or to enhance minority participation, and the resulting district configurations arguably created some dilution of the voting strength of a particular political party, that party could then assert a *Bandemer* type claim of political gerrymandering which would be difficult to combat.

Likewise, if the California Legislature decides that portions of Los Angeles and Orange Counties should be lumped together into one district because the combined area constitutes part of a larger metropolitan area, but this choice results in those two counties and some of the cities contained therein being split more times than strictly necessary by virtue of their populations, as well as a deviation from compactness and contiguity in other districts far removed through operation of the "ripple effect", claims of political gerrymandering might again follow. *The possibilities for litigation are simply endless*.

Indeed, given that state legislatures often emphasize one particular consideration, such as compactness and contiguity of districts, *in one area of a state* (for example, urban areas with high population density), while being more concerned with other factors such as basic communities of interest *in other areas of the state* (e.g., in rural areas where the interests of the residents are more closely tied to the geographical features of the land), with yet a third consideration, such as the prevention of a race between two popular incumbents living in close proximity, influencing the drawing of district lines in a *third* region, reapportion-

ment plans *invariably resemble patchwork quilts or jigsaw puzzles.*

While consideration of each of these factors has been recognized to be proper, their consideration in this particular manner could lead to charges of "irrational map-making". (Jurisdictional Statement, at A-29.) Those dissatisfied with the plans enacted would of course claim that no cohesive rationale underlies the entire plan and that, in reality, such purported considerations simply mask a discriminatory intent. Again, under the approach adopted by the district court, such claims could prove extremely difficult to refute.

Simply stated, given the multitude of factors which may (but need not be) taken into account in fashioning new reapportionment schemes, a federal court would be faced with a wholly unmanageable task in attempting to determine whether the minimization of county or city splits in one particular area, or a special emphasis on compactness and contiguity or the protection of incumbents in another, evidenced *legitimate state concerns or an intent instead to discriminate against the minority political party or parties.*

Thus, the considerations noted by the *Bandemer* court simply do not provide any guidance for a court about to enter the "political thicket" in search of partisan or political gerrymanders. Neither statistical analyses, used to measure disproportionate *impact*, nor the consideration of the shape of various districts, supposedly indicative of discriminatory *motive*, provide the type of "judicially discoverable and manageable standards" necessary to render such claims justiciable. (*Baker*, 369 U.S. at 217.)²⁴ For this

²⁴The district court also focused upon what it termed the "inconsistent and unexplained use of multi-member districts". (Jurisdictional Statement, at A-30.) Inasmuch as Article IV, § 6, of the California Constitution forbids the use of multi-member districts, the

reason, and because of the tremendous avalanche of frivolous and inconclusive litigation which is likely to follow, the decision of the court below must be reversed.

V

THE *BANDEMER* DECISION, IF NOT REVERSED, WILL CREATE CHAOS IN VIRTUALLY EVERY STATE IN THE UNION.

As noted hereinabove, the lack of any judicially discoverable or manageable standards for evaluating claims of political gerrymandering will create a situation in which the minority party in any state, if dissatisfied with the reapportionment process, may easily bring (simply by alleging disproportionate impact and the preference of one particular consideration over another) superficially plausible challenges to the reapportionment plan enacted by that state's legislature. As a result, federal courts will be inundated with challenges to various state and local apportionment schemes and, given the fact that courts will have no clear guidance in evaluating such claims, it will be difficult to quickly dispose of frivolous or insubstantial actions.

The legacy of *Bandemer* will then be a clogging of the federal court system and the creation of a climate in which the members of state legislatures will be forced to spend *more time litigating than legislating*. Reapportionment has already proved to be a tremendously litigious subject, even

California Senate will not address the issue of whether the "use of multi-member districts" in a state redistricting scheme can provide a judicially manageable indice of partisan gerrymandering. While a judicial focus on this objective factor may be somewhat more reliable than a focus on amorphous concepts related to district configurations or statistical analyses, in to varying interpretations, the California Senate must note that the use of multi-member districts has been sanctioned by previous decisions of this Court. (See, e.g., *Reynolds*, 377 U.S. at 579; *White v. Regester*, 412 U.S. at 765; *Whitcomb v. Chavis*, 403 U.S. 124 (1971).)

without recognition of political gerrymandering as a justiciable constitutional claim.²⁵ California, for example, has suffered through *three decades* of ever-increasing reapportionment litigation, with the result being that the reapportionment which followed the 1980 decennial census spawned no fewer than *eight* separate actions, some of which are still pending nearly five years later. The following will briefly summarize this history.

A. The 1960 California Reapportionment.

Following issuance of this Court's landmark decision in *Baker v. Carr*, actions were filed challenging the validity of California's reapportionment schemes in both state and federal courts. (See *Yorty v. Anderson*, 60 Cal.2d 312 (1964); *Silver v. Jordan*, 241 F.Supp. 576 (S.D. Cal. 1964).) And, after announcement of this Court's equally significant *Reynolds v. Sims* decision, the United States District Court for the Southern District of California found the apportionment of the *State Senate* to be constitutionally invalid. (241 F.Supp. at 582.) This conclusion was affirmed by this Court in *Jordan v. Silver*, 381 U.S. 415 (1965).

The California Supreme Court, in *Silver v. Brown* ("Silver I"), 63 Cal.2d 270 (1965), likewise found the *Assembly* reapportionment plan to be invalid, and thereupon took it upon itself to prepare temporary reapportionment plans which would be used in the 1966 elections were the Legislature to fail to enact valid plans. Although the Legis-

²⁵This Court noted that, within nine months of its decision in *Baker v. Carr*, litigation challenging the constitutionality of state legislative reapportionment plans had been instituted in *at least 34 of the 50 states in the Union*. (*Reynolds*, 377 U.S. 556 n.30.) It is submitted that the recognition of the justiciability of claims of "political gerrymandering" will likely trigger a similar avalanche of litigation, especially in light of the fact that, as discussed hereinabove, there simply are no clear-cut standards with which to properly define and evaluate such claims.

lature did pass new reapportionment plans which were then signed into law by the Governor, further judicial intervention was necessary when the Governor refused to sign a follow-up bill designed to correct certain "technical errors" in the plans. (*Silver v. Brown* ("Silver III"), 63 Cal.2d 841 (1966).) All told, the California Court was forced to issue *six* separate opinions regarding the 1960 reapportionment.²⁶

B. The 1970 California Reapportionment.

In 1971, the California Legislature again apportioned the state's Congressional, Senate, and Assembly districts, based upon the results of the 1970 decennial census. However, the Governor this time refused to sign the bills passed by the Legislature and intervention by the California Supreme Court became necessary. In *Legislature v. Reinecke* ("Reinecke I"), 6 Cal.3d 595 (1972), the state high court, responding to this legislative deadlock, ordered that the 1972 elections be conducted in the districts enacted in the late 1960s (after the *Silver* series of decisions), and retained jurisdiction to promulgate its own set of reapportionment plans for the 1974 elections in the event that the Legislature and the Governor were unable to resolve their impasse.

The Supreme Court was subsequently forced to exercise its retained jurisdiction and appoint a commission of Special Masters to formulate appropriate apportionment plans for the State's Congressional, Senate, and Assembly districts. (*Legislature v. Reinecke* ("Reinecke III"), 9

²⁶In addition to the four decisions concerning *state* legislative districts, the California Supreme Court addressed the reapportionment of California's *Congressional* districts in *Silver v. Brown* ("Silver II"), 63 Cal.2d 316 (1965), and again in *Silver v. Reagan*, 67 Cal.2d 452 (1967).

Cal.3d 166 (1973).²⁷ Over a four-month period, these Special Masters completed the arduous task of reapportioning California's legislative and congressional districts, and the Supreme Court, after reviewing other plans offered by various parties and *amici* for its consideration, adopted the plans formulated by the Special Masters in its *fourth* decision addressing the 1970 reapportionment controversy. (*Legislature v. Reinecke* ("Reinecke IV"), 10 Cal.3d 396 (1973).)

C. The 1980 California Reapportionment.

While the reapportionment disputes of the 1960s and the 1970s required *ten* separate opinions from the California Supreme Court, as well as federal court litigation ultimately culminating in this Court's *Jordan v. Silver* decision, this previous litigation unfortunately pales into insignificance when compared to the litigation following the *1980 reapportionment*. Statutes reapportioning these districts were originally passed in 1981, based, of course, upon the results of the decennial census conducted in 1980.

When members of the minority party then qualified three separate referenda challenging those reapportionment statutes, both houses of the Legislature requested that the California Supreme Court remove the referenda from the ballot.²⁸ Ultimately, the Court ruled that the referenda peti-

²⁷The Court had previously extended the time for legislative enactment of replacement plans but the deadlock remained unresolved. (*Legislature v. Reinecke* ("Reinecke II"), 7 Cal.3d 92 (1972).)

²⁸Under Article II, §§ 9 and 10 of the California Constitution, the California electorate, through its reserved referendum power, may, with certain limited exceptions, veto any statute passed by the Legislature. Pursuant to this constitutional provision, a referendum petition which qualifies for the ballot normally stays operation of the challenged statute until the matter is resolved by the voters. (*Assembly v. Deukmejian*, 30 Cal.3d 638 (1982).)

tions, although facially defective, would nevertheless be considered to have qualified for the ballot.

As the qualification of a referendum petition challenging a statute prevents that particular statute from going into effect, California was faced with the prospect of holding its 1982 elections in outmoded districts which had become severely malapportioned due to population shifts occurring since implementation of the *Reinecke* plans. Reasoning that elections in such obsolete districts would contravene the constitutional standard of "one person, one vote", the California Court ordered that the plans formulated by the Legislature, but stayed by the referenda, be employed *on a temporary basis* for the 1982 elections. (*Assembly v. Deukmejian*, 30 Cal.3d 628 (1982).) A subsequent petition for *certiorari* was denied by this Court. (*Republican National Committee v. Burton*, 456 U.S. 941 (1982).)²⁹

Far from *resolving* the dispute underlying the apportionment of California's legislative and congressional districts, the California Supreme Court's decision in *Assembly v. Deukmejian* spawned litigation in *three of California's four federal district courts*.³⁰ Nor did this litigation end the

²⁹Justice Mosk of the California Supreme Court, commenting in *Assembly v. Deukmejian* upon the "wrenching experiences of 1971 and 1981", dubbed the reapportionment process a "decennial debacle". (30 Cal.3d at 693-94, Mosk, J., dissenting.) Unfortunately, given the fact that the current reapportionment controversy shows no signs of abatement, as exemplified by the *three currently pending* actions discussed *infra*, Justice Mosk's 1982 assessment of the process as a "decennial debacle" has apparently proved to be overly *optimistic*.

³⁰Actions were filed in the United States District Court for the Central District of California (*Chavez v. Eu*, Case No. 82-0571 CBM), the United States District Court for the Northern District of California (*Richardson v. Eu*, Case No. C-82-1035-WAI), and the United States District Court for the Eastern District of California (*Halliwell v. Eu*, Case No. Civ. S-82-147 LKK), all challenging the

matter. After the electorate rejected (in the 1982 elections) the reapportionment plans originally promulgated by the Legislature, the Legislature adopted new sets of district lines. True to form, however, the new enactments triggered a new round of litigation, consisting of *not one, but four* separate actions, filed in both state and federal court.

The first arose from an attempt by dissatisfied members of the minority party to bypass the legislative process by submitting to California voters an initiative which, if passed, would have supplanted the legislatively enacted replacement plans with new plans designed by the minority party. However, under the California Constitution, the State may reapportion itself, either by legislation *or* by initiative, *only once per decade*, and the California Supreme Court therefore ordered the Secretary of State, in *Legislature v. Deukmejian*, 34 Cal.3d 658 (1983), to remove this initiative from the ballot.

The remaining actions each addressed the constitutionality of the new districts, as enacted by the Legislature and signed by the Governor. Two of these actions are currently pending, as is the holdover *Halliwell* action referenced in footnote 30, *supra*.³¹ As a result of this ongoing partisan

use of the Court-ordered districts. Although both the *Richardson* and *Chavez* matters were dismissed at an early stage, the *Halliwell* matter, filed by a *pro se* litigant, is still pending in the Eastern District.

³¹These actions are *Badham v. Eu*, No. 85-1266, which has already resulted in decisions from the United States District Court for the Northern District of California and the Ninth Circuit Court of Appeals (*Badham v. District Court*, 721 F.2d 1170 (1983)), as well as a petition for *certiorari* to this Court; *Members of the California Democratic Congressional Delegation v. Eu*, now pending in the Superior Court of the State of California for the County of Los Angeles (Case No. C 450 827); and *Santillan v. Eu*, the newest arrival, recently filed in the United States District Court for the Central District of California (Case No. 84-7181 PAR), but later dismissed by the plaintiffs.

dispute, California has been forced to conduct its last three statewide elections in *three successive sets of legislative districts* and faces the very real possibility that litigation regarding the 1980 reapportionment will extend well beyond the mid-point of the decade, even without serious consideration of claims of political gerrymandering.³²

Recognition of the justiciability of such claims such as that involved in *Bandemer* will do nothing more than add *yet another layer of litigation* to an already arduous and painful process. Moreover, given the amorphous nature of the standards relied upon by the *Bandemer* court, it is likely that actions seeking redress for alleged partisan gerrymandering will stretch on for years, leaving state legislatures such as that of California to become professional litigants, rather than lawmakers.³³ Such a result, it is sub-

³²California's 1980 elections were held in the districts created by *Reinecke IV*; the 1982 elections were held in the districts promulgated by the California Legislature after the 1980 census and ordered into temporary effect by the *Assembly v. Deukmejian* decision; and the 1984 elections were held in the replacement districts subsequently enacted by the California Legislature but now the subject of new legal challenges.

³³Indeed, given the emphasis placed upon the deposition testimony of Indiana legislators by the court below, it is likely that litigants serious about pressing claims of political gerrymandering will attempt to depose virtually every state legislator who cast a vote in favor of the apportionment plan or plans at issue. Not only is such inquiry into the personal motives of state legislators generally frowned upon (*see, e.g., United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); *Arizona v. California*, 283 U.S. 423, 455 (1931)), but allowing such discovery would also distract state legislators from the business of legislating and thereby impede important governmental functions.

mitted, will inure to the benefit of no one, least of all to California's already reapportionment weary electorate.³⁴

Because of the severe impact which the *Bandemer* decision will have, if left intact by this Court, and because claims of political gerrymandering simply cannot be evaluated by the required judicially discoverable and manageable standards, the California Senate urges this Court to immediately reverse the decision of the court below. Any other result will create havoc in virtually every state, and further clog the federal court system.³⁵

³⁴Indeed, the summary of California reapportionment litigation set forth in the text does not even begin to address the tremendous volume of litigation which has arisen from the reapportionment of local governing bodies. (See, e.g., *Calderon v. Los Angeles*, 4 Cal.3d 251 (1971); *Miller v. Board of Supervisors*, 63 Cal.2d 343 (1965); *Henderson v. Superior Court*, 61 Cal.2d 883 (1964); *Visnich v. Board of Education*, 37 Cal.App.3d 684 (1974); *Griswold v. San Diego*, 32 Cal.App.3d 56 (1973).) The reapportionment of such local governmental bodies is of course subject to the dictates of the Fourteenth Amendment. (E.g., *Avery v. Midland County*, 390 U.S. 474 (1968).) Nor has the Senate elected to discuss two successive and hotly debated reapportionment initiatives presented to, but rejected by, California voters, which initiatives would have placed the task of reapportionment in the hands of an "independent" commission.

³⁵As an alternative, the Court could summarily vacate and remand the matter. This approach would be consistent with the recent disposition of *Escambia County v. McMillan*, ____ U.S. ____, 104 S.Ct. 1577 (1984). In *Escambia*, the district court had found that the use of at-large elections for County Commissioners discriminated against black voters in violation of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. The Eleventh Circuit affirmed on the constitutional claims, without considering the Voting Rights Act claims. This Court vacated the subsequent appeal and remanded the matter to the Court of Appeals for consideration of the Voting Rights Act claims, noting that "normally the Court will not decide a constitutional question if there is some other ground [such as the Voting Rights Act claim] upon which to dispose of the case". (104 S.Ct. at 1579.) As *Bandemer* also involved claims of Voting Rights Act violations brought by the NAACP, the matter could be vacated and remanded to the district court for consideration of these issues.

VI

CONCLUSION.

For all of the foregoing reasons, the California Senate respectfully requests that this Court continue to treat claims of alleged political gerrymandering as nonjusticiable and, on that basis, reverse the opinion of the court below.

Respectfully submitted,

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MAY 9 1985

ALEXANDER L. STEWART,
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No. 84-1244

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,

Appellants,

VS.

IRWIN C. BANDEMER, *et al.*,

Appellees.

Appeal From The United States District Court
 For The Southern District of Indiana

**MOTION FOR LEAVE TO FILE AMICUS CURIAE
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QUESTIONS PRESENTED

1. Whether partisan gerrymandering is justiciable?
2. Whether the votes-to-seats ratio utilized by the court below conflicts with prior decisions of this Court and threatens discrimination against Hispanics?

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No. 84-1244

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

SUSAN J. DAVIS, et al.,
Appellants,

vs.

IRWIN C. BANDEMER, et al.,
Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF INDIANA

MOTION OF MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND
FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42.2.(b) of the Rules
of this Court, the Mexican American Legal
Defense and Educational Fund (MALDEF)

respectfully move for leave to file a brief as amicus curiae in support of appellants Susan J. Davis, et al. Appellants and NAACP plaintiffs have consented to the filing of this brief; appellees refuse consent.

Interest of Amicus Curiae

The Mexican American Legal Defense & Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure the civil rights of Hispanics living in the United States through advocacy, education and litigation.

MALDEF has long been active in reapportionment and redistricting issues. It has litigated White v. Regester, 412 U.S. 755 (1973), and City of Lockhart v. U.S., 460 U.S. 125 (1983), before this Court. Currently MALDEF represents one of the respondents in Ketchum v. Byrne, 740 F.2d 1398 (1984), cert. pend. sub nom. City

Council of City of Chicago v. Ketchum, 84-627, October 18, 1984.

Reapportionment is of vital concern to the Hispanic community. MALDEF's interest in the instant litigation is based on the concern that Hispanics will be adversely affected in future reapportionments if the standard applied by the court below is allowed to stand. The lower court emphasized compactness and compared voter turnout to electoral seats won in deciding whether a prima facie case of partisan gerrymandering existed. Because of the unique demographics of the Hispanic community, such a proportional standard will have a devastating impact on the ability of Hispanics to have districts fairly drawn. Indeed, the lower court's proposed standard conflicts with prior decisions of this Court concerning proportional representa-

tion and federal and constitutional provisions protecting minority voting rights.

STATEMENT OF THE CASE

The court below, a three judge panel appointed pursuant to 28 U.S.C. §2284, in an unpublished opinion,¹ invalidated the 1981 Indiana House and Senate reapportionment plans and held that Indiana Democrats were the victims of a partisan gerrymandering by the Republican leadership of the Indiana legislature (A-32-33).

The Honorable James E. Noland, Chief District Judge, writing for the majority,² found that it was "significant . . . that in 1982 Democratic candidates for the Indiana House earned 51.9 percent of

¹All references to the trial court's opinion in this brief are to Appendix A of the Appellant's Jurisdictional Statement.

²The Presiding Judge, the Honorable Wilbur F. Pell, Jr., dissented on the partisan gerrymander issue.

all votes cast across the state. However, only 43 Democrats were elected to seats" out of the 100 House seats up for election (A-11). The Court found that "the disparity between the percentage of votes and the number of seats won is, at the very least, a signal that Democrats may have been unfairly disadvantaged by the redistricting." (A-12)³

The Court then examined the shapes of the districts to determine whether a partisan gerrymandering occurred. The Court found "a lack of any consistent application of 'community of interest'⁴ principles."

³In the Indiana Senate the Court found that of the 25 seats which were up for election, the Democrats won 53.1 percent of the vote and 13 Senate seats. (A-12)

⁴The Court defined "community of interest" as the inclusion of citizens in a given legislative district who share a geographic area, with similar concerns and needs to be met by their state legislators." A-14

(A-14) Using Marion County as an example, the Court found the "shapes are unusual for a number of reasons, notably because of the necessity of adding townships from contiguous counties to preserve the 15-seat Marion County delegation to the Indiana House despite a population decrease." (footnote omitted) (A-15)

The court further found that "[t]hese districts are particularly suspect with respect to compactness." In scrutinizing District 48, the Court found that the district formed the letter "C" around the central city of Indianapolis. (A-15)

The court next examined the motivation of the Republican leadership in adopting the Indiana reapportionment plan. Other than a concern for the one person, one vote principle and a concern about no "retrogression" of black representation from prior years, the court found "most notably"

that the majority party wished to "insulate itself from the risk of losing its control of the General Assembly." (A-17)

Finally, the Court examined the use of multimember districts in the House plan. The Court "found that the disadvantaging effect of the plan's multimember districts falls particularly hard and harsh upon black voters in the state." The court found that 81.2 percent of blacks as compared to 35 percent of whites lived in multimember districts, and that only 43 percent of the blacks lived in multimember districts where blacks comprise a majority of the voters. (A-18)⁵

⁵The NAACP, in a separate law suit which was later joined to this case, also challenged the Republican reapportionment plan as having intentionally fragmented the black population concentrations in violation of the 14th and 15th amendments and as having perpetuated the effective dilution of black voting strength in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973j, as amended 1982.

The court below ruled against the

In the trial court's Analysis and Conclusions of Law, it did not discuss the justiciability of partisan gerrymandering nor review this Court's prior determinations on this issue. Instead, based upon Justice Stevens' concurring opinion in Karcher v. Daggett, 462 U.S. 725 (1983), it concluded that the "district lines were drawn with the discriminatory intent to 'maximize the voting strength' of the Republican Party and to 'minimize the strength' of the Democratic Party. . . . and therefore . . . violat(ed) . . . the Equal Protection Clause in the form of political gerrymandering. . . ." (A-25)

NAACP plaintiffs holding "that the voting efficacy of the NAACP plaintiffs was impinged upon because of their politics and not because of their race." (A-20)

SUMMARY OF ARGUMENT

The court below leaped into a political quagmire when it determined without analysis of prior case law that partisan gerrymandering constitutes a justiciable claim under the equal protection clause of the 14th amendment. In Baker v. Carr, 369 U.S. 186 (1962), this Court transformed a constitutional right into a judicially enforceable right because there was a clear and neutral standard -- one person, one vote -- by which the judiciary could measure compliance with the constitutional mandate of equal protection.

But no such standards exists to evaluate claims of partisan gerrymandering. To be sure, there are criteria which can be used in drawing districts, but they are not neutral. Many of the more popular criteria--compactness, respect for local political boundaries, community of interest, -- may

conflict with one another or conflict with other constitutional principles such as equality of population, or dilution of minority voting rights.

In formulating a standard by which to evaluate partisan gerrymandering, the court below emphasizes compactness⁶ and compares the popular votes cast statewide with the number of seats won to determine the extent of partisan gerrymandering. If this

⁶The trial court's emphasis on compactness will seriously dilute Hispanic political representation. In many areas of the Southwest, Mexican Americans sprawl throughout a geographic area, e.g., along a meandering river valley, crossing city or county boundaries. An emphasis on compactness as opposed to community of interests will completely submerge the electoral strength of the Hispanic community. See, B. Cain, The Reapportionment Puzzle 46-68 (University of California Press 1984); see also, Jordan v. Winter, No. GC 82-80-WK-0 (N.D. Miss., April 16, 1984), aff'd sub nom. Brooks v. Allain in Mississippi Republican Executive Committee v. Brooks, U.S. ___, 105 S.Ct. 416 (1984) (sprawling uncompact districts in court ordered interim plan adopted to assure fair racial representation).

approach is allowed to stand, it will draw the trial court into conflict with this Court's rulings on the one person, one vote principle, and its prohibition against proportional representation. Ultimately, it will unlawfully dilute minority, especially Hispanic, representation.

In Burns v. Richardson, 384 U.S. 73, this Court warned against using voter registration and voter turnout as a guide to apportioning districts. Because Hispanics and other minority groups have been the victims of discrimination in the political process, and because they are younger, have lower education and income levels, and have higher unemployment and poverty rates than the dominant groups in American society, minorities, especially Hispanics, are less likely to be politically active, to register and to vote. The effect of the trial court's votes-to-seats-won standard for

determining a prima facie case of partisan gerrymandering is that Districts will be drawn primarily reflecting voter turnout, thus perpetuating underrepresentation of Hispanics and other minority groups in American society. The political gains that Hispanics and other minorities have made over the last decade will be eroded.

ARGUMENT

I.

CLAIMS OF PARTISAN GERRYMANDERING ARE NOT JUSTICIABLE BECAUSE THERE ARE NO NEUTRAL AND NON-PARTISAN JUDICIALLY MANAGEABLE CRITERIA TO GUIDE THE COURT.

The court below leaped into a political quagmire when it decided without analysis of prior case law⁷ that partisan gerrymandering constitutes a justiciable claim under the equal protection clause of the 14th amendment. This imprudent judg-

⁷The Court below was bound by precedent of this Court and by the 7th Circuit. In WMCA, Inc. v. Lomenzo, 382 U.S. 4 (1965), this Court summarily affirmed a three judge district court decision rejecting a constitutional challenge for partisan gerrymandering to a New York legislative reapportionment. Lower courts are bound by summary decisions of the Supreme Court. Hicks v. Miranda, 422 U.S. 332, 344-45 (1975). The 7th Cir., in Cousins v. City Council of the City of Chicago, 466 F.2d 830, at 844, cert. denied, 409 U.S. 893 (1972) followed WMCA, holding that partisan gerrymandering is nonjusticiable.

ment contravenes the efforts of this Court to move cautiously and forcefully in closely scrutinizing "highly suspect" governmental classifications which discriminate on the basis of race, color or national origin⁸.

In Baker v. Carr, 369 U.S. 186 (1962), this Court significantly clarified the 'political questions doctrine'⁹ and

⁸The classic statement of this issue is Justice Stone's footnote in United States v. Carolene Products Co., where he states:

"legislation . . . (may) be subjected to more exacting judicial scrutiny (when) . . . directed at particular religious, . . . or national, . . . or racial minorities . . . (P)rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. 144, 152-53 at n. 4 (1938) (Emphasis added.)

⁹Many of the 'political question' guidelines considered and overcome by the Court in the case of challenges to malapportioned districts based on population inequality

required states to fairly apportion districts on an equal population basis. The Court in Baker was able to transform a constitutional right into a judicially enforceable one because there was a non-partisan and neutral "judicially manageable" standard -- one person, one vote -- by which the judiciary could measure compliance with the Constitutional mandate of equal protection.

are much more problematic in cases challenging partisan gerrymandering:

"Prominent on the surface of any case held to involve a political question is found . . . a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" 369 U.S. at 217. (Emphasis added.)

Claims of partisan gerrymandering are a political quagmire precisely because no neutral nor nonpartisan standards exist to impartially judge this phenomena. There are, to be sure, criteria which can be used in drawing districts. But they are judgment laden, not neutral, criteria and they are not constitutionally mandated. Many of the more popular criteria -- compactness, respect for local political boundaries, community of interest, -- reflect political values¹⁰ and may conflict with one

¹⁰Political groups are not spread evenly throughout a state. The choice of where to place political boundaries and what priority one standard ought to have over another reflects a political value. For example, as between two competitive groups, compactness will favor a group which is evenly spread throughout an entire state because of the "wasting" of votes which is likely to occur if the other group is highly concentrated in large numbers in a few areas.

another¹¹ or conflict with other constitutional principles such as equality

¹¹Community of interest may conflict with compactness. For example, if an agricultural community surrounds a large urban area, the choice may be between a donut shaped district (reflecting priority given to two separate community of interests) or two nicely shaped districts, resulting in the complete submergence of agricultural interests to urban interests (reflecting a preference for compactness).

Likewise, respect for local political boundaries may conflict with the compactness principle especially if an urban area has an unusual geographic shape. See, e.g., U.S. Bureau of the Census, Congressional Districts of the 99th Congress (California), sheets 10 and 11, pp. 93-94 (1985) (political boundaries of the City of Industry, California, has long tentacles reaching across the San Gabriel Valley).

The community of interests of minority groups sometimes come into conflict with the compactness principle. Hispanic voters, for example, sprawl throughout the Los Angeles County area. Because of the unique demographics of the Hispanic community (see footnotes 23-28, *infra*), Hispanic electoral strength will be completely diluted if the compactness principle is followed. See, authorities cited in footnote 6, *supra*.

of population,¹² or prohibitions against dilution of minority voting rights.¹³

¹²Since population equality is paramount, especially in Congressional reapportionment, (see Karcher v. Daggett, *supra*), local jurisdictions sometimes must be split. This may be necessary on occasion, depending upon the location of the jurisdiction within a state, even if a local jurisdiction is the exact size as a Congressional District because of the "ripple effect" of evenly dividing a population throughout a state.

¹³ The classic case of racial gerrymandering is Gomillion v. Lightfoot, 364 U.S. 339 (1960). It is not inconceivable that a City like Tuskegee could draw its councilmanic districts including its 40% black population within the jurisdiction of the city and at the same time exclude them from political power using "neutral" principles such as compactness. The city lends itself to one at large mayoral position and four councilmanic districts drawn on a north-south and east-west axis. Because of the location of the black population within the city of Tuskegee, see 364 U.S. at 389 (chart showing the City of Tuskegee, Alabama), such a "neutral" plan would effectively eliminate black political participation.

II.
THE VOTES-TO-SEATS RATIO OFFENDS
PRIOR DECISIONS OF THIS COURT AND
UNLAWFULLY DISCRIMINATES AGAINST
HISPANICS.

The court below compares the 1982 popular statewide Democratic vote (51.8%) in the Indiana House with the number of seats won (43%) by the Democrats as a means of determining whether there was partisan gerrymandering. By focusing on the ratio of actual votes cast to number of seats won, the court offends the one person, one vote standard, comes perilously close to adopting a rule of proportional representation - an outcome which neither this Court, (see Mobile v. Bolden, 446 U.S. 55, 76, 86, 1980), nor Congress (see Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973) has ever condoned, and

unlawfully dilutes Hispanic voting rights.¹⁴

This Court has warned against the use of both voter registration and voter turnout criteria as a guide to apportioning districts:

"Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote.

¹⁴There are additional problems with the votes-to-seats ratio. While the ratio seems to be an easy method to measure partisan gerrymandering, the votes-to-seats ratio oversimplifies the electoral and reapportionment processes.

The court below did not analyze many of the complexities present in the electoral process which may account for a discrepancy in the votes-to-seats ratio. For example, a few of the factors influencing the votes to seat ratio include: the number of candidates who were incumbents; the amount of money raised and spent by each candidate; the number of votes cast for unopposed candidates; the political affiliation of the unopposed candidates; the significance of local, regional, state or national issues affecting the outcome of a particular election.

Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a 'ghost of prior malapportionment.' Burns v. Richardson, 384 U.S. 73, at 92-93 (1985)

Hispanic groups in the United States have a lower voter turnout compared to other groups in American society.¹⁵

The reasons for the low Hispanic voter turnout are varied. Historically, Mexican Americans and Puerto Ricans, the two largest Hispanic groups¹⁶, have been

¹⁵According to the Census Bureau, the percentage of individuals registered to vote in 1982 are: Whites-65.6%; Blacks-59.1%; Hispanics-35.3%. The percentage of individuals who actually voted in 1982 are: Whites-49.9%; Blacks-43.0%; Hispanics-25.3%. U.S. Bureau of the Census, Statistical Abstract of the United States: 1985, 254 (1984) (hereinafter cited as Statistical Abstract of the United States: 1985).

¹⁶Of the 14.6 million Hispanics enumerated by the 1980 census, 60% were of Mexican origin, 14% of Puerto Rican origin, 5% of Cuban origin, and 21% of other Spanish origin. U.S. Bureau of the Census, General

victimized by discrimination in every conceivable public and private enterprise from jury selection,¹⁷ to segregated

Population Characteristics, United States Summary, PC80-1-B1, 1-14 (1981)

¹⁷See, e.g., Hernandez v. Texas, 347 U.S. 475 (1954); Castaneda v. Partida, 430 U.S. 482 (1977); see generally, U.S. Comm. on Civil Rights, Mexican Americans and the Administration of Justice in the Southwest (1970).

schools,¹⁸ housing,¹⁹ public accommodations,²⁰ employment,²¹ and the political

¹⁸See, e.g., Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973); Cisneros v. Corpus Christi ISD, 467 F.2d 142 (5th Cir. 1972); U.S. v. Texas Education Agency (Austin I), 467 F.2d 848 (5th Cir. 1972) (en banc); Independent School District v. Salvatierra, 33 S.W.2d 790 (Tex.Civ.App.-San Antonio 1930), cert. den., 284 U.S. 580 (1931); Tex. Att'y Gen. Op., May 27, 1925 (bond approval for Mexican-American schools); see generally, U.S. Comm. on Civil Rights, Mexican American Education Study 1967-1974, cited with approval by this Court in Keyes, supra, at 197 (N. 7, 8).

¹⁹See, e.g., Clifton v. Puente, 218 S.W.2d 790 (Tex.Civ.App. 1930) (restrictive covenants against persons of Mexican descent).

²⁰See, e.g., Tex. Att'y Gen. Op., No. V-150 at 45 (1947) (Mexican Americans barred from swimming pools); see also, Rangel, De Jure Segregation of Chicanos in Texas Schools, 7 Harv. Civ. Rts. & Civ. Lib. L. Rev. 307 (1972) (Mexican Americans not served in restaurants, drug stores, barber shops, beauty shops, theaters, hotels, bowling alleys, cemeteries).

²¹Employment discrimination by both public and private employers has been extensively documented. See, e.g., Garcia v. Victoria ISD, 17 EDD 8544 (S.D. Tex. 1978); Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975); Saucedo v. Brothers Well Service, Inc., 498 F.2d 641 (5th Cir. 1974);

process itself.²² This governmental and societal discrimination is responsible in part for Hispanics having lower educational²³, employment²⁴ and family income²⁵

Moreno v. Henckel, 431 F.2d 1299 (5th Cir. 1970); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

²²See, e.g., Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972) (three judge court), aff'd in pertinent part, sub nom, White v. Regester, 412 U.S. 755 (1973). See also, Senate Report No. 94-295, 1975 U.S. Code Congressional and Admin. New. 775, 790-97; House Report No. 94-196 (Hearings on Extension of Voting Rights Act to Texas).

²³The 1985 Statistical Abstract provides the following 1983 comparative data on the racial and national origin background of individuals over 25 years of age who have completed 4 years of high school or more: White-73.8%; Black-56.8; Mexican American-41.1%; Puerto Rican-41.6%; Cuban-51.8%; Other Spanish origin-62.3%. Statistical Abstract of the United States: 1985, Table 217, p. 136 (1984)

²⁴The 1983 Current Population Survey reveals the following unemployment rates for the following groups: Whites-8.4; Blacks-19.5; Mexican-American-17.4; Puerto Rican-18.0; Other persons of Spanish Origin-13.2. Statistical Abstract of the United States: 1985, Tables 35, 36, 39, pp. 32,34 (1985)

levels than the dominant groups in American society. Furthermore, Hispanics are much younger than most other groups in American society and thus have fewer eligible

²⁵The 1983 Current Population Survey provides the 1982 median income levels for the following groups: Whites-\$24,603; Blacks-\$13,599; Mexican-Americans-\$16,399; Puerto Ricans-\$11,148; Other Spanish Origin-\$18,996. It also has the percentage of the population living below poverty level: Whites-12%; Blacks-35.5%; Mexican-American-30%; Puerto Ricans-46.3%; Other Spanish Origin-19.8%. Id.

voters.²⁶ Since it is an axiomatic principle of American political science that voter registration and turnout is directly correlated to age, education and income²⁷,

²⁶According to the Census Bureau, 72.8% of the U.S. population is voting age compared to 59% for Mexican Americans, 58.5% for Puerto Ricans, and 66.9% for other Spanish origin. Statistical Abstract of the United States: 1985, Table 40, p. 34 (1985).

Voter turnout is directly proportional to age; i.e., older citizens vote more often than younger ones. See, e.g., Statistical Abstract of the United States: 1985, Table 425, p. 254 (1984)

This phenomenon has a greater impact on the Hispanic community because it has fewer individuals over the age of 65 (3.7% for Mexican Americans, 2.5% for Puerto Ricans, and, 6.3% for other Spanish origin) than the U.S. population as a whole (11.2% of all persons are 65 or over). *Id.*, Table 40, p. 34.

²⁷This is because, in part, the elderly and those with higher income and education have more leisure time to become involved in politics. Likewise, the level of political skills needed to become involved in politics is more closely aligned to the skills of white collar workers than the skills of blue collar workers. See R. Wolfinger & S. Rosenstone, *Who Votes*, 15-60 (Yale 1980); A. Campbell, P. Converse, W. Miller, & D. Stokes, *The American Voter* 49-64 (Wiley & Sons 1964); S. Verba & N. Nie, *Participation in America* 149-173 (Harper &

it should not be surprising that Hispanics have a lower level of political participation.

Additionally, Hispanics tend to concentrate in the inner city,²⁸ with other minorities and the working poor. Since they share similar socioeconomic concerns, they comprise districts which tends to favor a single political party. Thus, any contest emerging between candidates will most heavily be waged during the primary. After the primary, the election outcome is

Roe 1972).

²⁸According to the Census, 53.1% of Hispanics live in central cities, as compared to 59.7% of Blacks and 27% of Whites; 37% of Hispanics live outside central cities (i.e., suburbs), as compared to 22.3% of Blacks and 47.5% of Whites; and, 11.9% of Hispanics live outside metropolitan areas (i.e., rural areas), as compared to 18% of Blacks and 25.5% of Whites. Statistical Abstract of the United States: 1985, Table 20, p. 17 (1984).

usually already known, so there is less reason to vote in the general election.²⁹

If this Court affirms the votes-to-seats ratio even as part of a broader test for partisan gerrymandering, it will have a devastating impact on minority, and especially Hispanic, representation because of the above-cited factors which lead to lower

²⁹For example, the South-Central and Eastern portions of the city of Los Angeles are made up of primarily Black and Hispanic voters. The following 1984 General Election data for assembly districts which are physically adjacent to one another in the above-mentioned areas reveals the following voter turnout for Black and Hispanic incumbents:

<u>A.D. Incumbent Votes (%)</u>			
47	Hughes	45,039	(87.0)
48	Waters	59,507	(85.8)
49	Moore	81,117	(76.0)
50	Tucker	70,716	(79.5)
55	Alatorre	44,505	(70.1)
56	Molina	26,981	(81.5)
59	Calderon	55,869	(67.1)

Source: Secretary of State, State of California, Official Canvass of the Vote, November 6, 1984, General Election, 19-20 (December 15, 1984)

minority voter turnout. For example, in Southern California, the upper income, suburban and primarily white congressional

districts average more than 100,000 voters per congressional district³⁰ when con-

³⁰The following table contrasts total votes cast in six minority (3 Hispanic and 3 Black) and six high income (primarily white) Congressional Districts in Southern California during the 1984 General Election Campaign:

Six Southern California Urban and Minority Held Districts:

CD	Incumbant	Total Votes Cast
25	Roybal	103,599
28	Dixon	149,517
29	Hawkins	125,558
30	Martinez	124,333
31	Dymally	142,349
34	Torres	145,527
TOTAL VOTES CAST:		790,883
		(131,813 average votes)

Six Southern California Suburban High Income and White Districts:

39	Dannemeyer	230,677
40	Badham	254,974
41	Lowery	253,846
42	Lungren	243,619
43	Packard	223,517
45	Hunter	198,307
TOTAL VOTES CAST:		1,404,940
		(234,157 average votes)

Source: Secretary of State, State of California, Official Canvass of the Vote, November 6, 1984, General Election, 7-9 (December 15, 1985)

trasted with lower income, urban and primarily minority congressional districts.³¹

If the trial court's prima facie standard for determining partisan gerrymandering is followed, districts will be drawn by legislators with voter registration and turnout as the chief criteria so as to avoid challenges of partisan gerrymandering. In many instances, the effect will be to submerge racial and ethnic minority interests and perpetuate the

³¹The above-referenced groups of Congressional districts in the previous footnote compare as follows: the upper income group has a median family income of \$25,275 compared to \$14,960 for the low income group; 83% of the upper income group have completed high school compared to 56.8% of the low income group; the upper income group is composed of 2% Black and 11% Hispanic as compared with the low income group which is composed of 23% Black and 42% Hispanic. U.S. Bureau of the Census, Congressional Districts of the 99th Congress: California, Tables 1, 4, 6, 7, pp. 5-6, 26-27, 36-38, 45-50, PHC80-4-6 (Calif.), February 1985.

underrepresentation of Hispanics and other minority groups.

CONCLUSION

For the reasons discussed herein, the Court should reverse the decision of the court below.

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No. 84-1244

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**AMICUS CURIAE BRIEF OF
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SUMMARY OF ARGUMENT

Ignoring precedent and every principle of judicial restraint, the district court in this case reached out to do what no federal court has done before. It entered the thicket of partisan politics and decided that a particular redistricting plan offered inadequate opportunities to one of the two major political parties to elect its members to a legislative body. The court attempted to chart a seemingly judicial, non-political course through the political thicket by invoking criteria — “compactness”, “proportionality”, “competitiveness” and “preservation of municipal boundaries” — that have been advanced by reformers who seek to bring “neutrality” to the frankly political process of redistricting.

Whatever may be said for or against these criteria as a basis for political reform, they fail utterly as neutral, judicially manageable standards for evaluating the competing redistricting claims of the many political interest groups that animate the political life of this country. The ideal of proportionality, while well-served in the representative system of several Continental democracies, is fundamentally at odds with the winner-take-all, district-based system used in the United States; it furthermore ignores the individual features of particular candidates and legislative races, as well as the fact that legislative districts are based on equal numbers of persons, not voters. Compactness, a concept so vague that the reformers themselves have been unable to agree on a workable definition, fails as an index of partisan excess because it, and its converse, are as compatible with districting plans that reformers decree "fair" as with those found wanting in partisan restraint. Compactness also embodies a political value, comparatively disadvantaging concentrated groups of relatively homogeneous voters by "packing" their votes into few districts. The pursuit of marginal or "competitive" districts and the preservation of city and county voting blocs similarly embody political values and are incapable of neutral or systematic implementation.

Reformist criteria also conflict with one another. No reformer has identified any neutral technique for ordering these values or making trade-offs between them and the respective constituencies who would benefit from their implementation. The intractability of these problems has led even many of the reformers to conclude that the reform they seek will have to come either through implementation of a proportional representation system or by taking the process out of the political arena and consigning it to independent commissions. Reform by such means is obviously well outside the realm of constitutional mandate and the charter of the federal courts.

I. INTRODUCTION

Reapportionment is, simply, the process of organizing a political jurisdiction's individual citizens into a set of equi-populous districts that will elect the jurisdiction's representatives. Any decision about the placement of district boundaries is a decision about the composition of the group of individuals who will comprise a particular district. In the United States, the individuals who make up these districts may belong to any number of salient groups: (1) Republicans, Democrats, and members of the American Independent, Peace and Freedom and American Nazi parties, (2) Blacks, Whites, Orientals, Hispanics, and American Indians, (3) farmers, laborers, businessmen, students, and pensioners, (4) persons of Italian, Armenian, German, Japanese, and Arabic backgrounds, (5) constituents of "special interest" groups concerned with nuclear power, conservation, handguns, moral majority values, renter's rights, and immigration issues, and (6) Mormons, Jews, Baptists, Catholics, and other religious groups. While the geographic distributions of members of these groups can in many cases be ascertained, each group will have a different distribution within a given jurisdiction.

The instant that a legislature or a court places itself at the redistricting drafting table and draws a line, it effects a political result by choosing among an infinite number of ways of distributing members of these groups among districts. Every choice will have differential effects on the various groups in question. As Professor Robert Dixon has observed: "The key concept to grasp is that there are no neutral lines for legislative districts." Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts*, in *Representation and Redistricting Issues* 7-8 (B. Grofman et al. eds. 1982).

Since *Baker v. Carr*, 369 U.S. 186 (1962), a number of academics and reformers have turned their attention to redistricting and have urged the federal courts to abandon their limited role as guardians of "mere" population equality in favor of a broader, roving charter to ensure "fairness" or "neutrality" in redistricting.¹ Those who favor judicial policing of gerrymandering are fond of quoting Chief Justice Warren's statement in *Reynolds v. Sims* that: "Fair and effective representation for all citizens is concededly the aim of legislative apportionment." *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).² These reformers frankly see this aim as extending beyond the guarantee of an equal individual vote; instead, they propose that the courts guarantee equal representation and "effectiveness" for the collective votes of competing political interest groups. For such writers, the "gerrymander", equipopulous or otherwise, is the antithesis of "fair and effective representation" for all voting groups.

¹ These reformers have been frankly impatient with what they see as the Court's preoccupation with numerical equality, which to them pales into insignificance next to what they perceive as the far graver problems of partisan excess. Robert Dixon, the leader of the entire movement, went so far as to label this Court's increasingly stringent equal population decisions a "Pavlovian response." Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts*, in *Representation and Redistricting Issues* 14 (B. Grofman et al. eds. 1982) (hereinafter "*Redistricting Issues*").

² For a recent and unrestrainedly enthusiastic recital of the basic contentions, see Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket?*, 1 J. Law & Pol. 357 (1984). For a more skeptical view, see B. Cain, *The Reapportionment Puzzle* (1984); Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, — UCLA L. Rev. — (1985) (forthcoming).

³ E.g., R. Dixon, *Democratic Representation: Reapportionment in Law and Politics* 17 (1968); Baker, *Threading the Political Thicket by Tracing the Steps of the Late Robert G. Dixon, Jr.: An Appraisal and Appreciation*, in *Redistricting Issues*, supra n.1 at 21-22; Dixon, supra n.1 at 13.

But the definitions the reformers propose of "gerrymandering" tend to be just as broad and vague as was Chief Justice Warren's formulation. Thus, "gerrymandering" is variously defined as "dilut[ing] the voting strength" of groups of voters,⁴ as "excessive manipulation of the shapes of districts,"⁵ as creation of an "unjustifiable advantage" for one party,⁶ as "discriminat[ion] against" one group,⁷ or in more down-to-earth language as "the dishing of one political party by the other."⁸

But voting strength cannot be characterized as diluted unless it can be compared to a level of strength that is agreed to be normal; the drawing of lines cannot be characterized as manipulative unless there is a method of drawing lines that is agreed not to involve manipulation; an advantage cannot be characterized as unjustifiable unless there is an agreed-upon standard of justification; a group cannot be characterized as discriminated against unless a state of affairs is agreed to constitute "neutrality"; and one political group's notion of dishing may well be seen by another such group as the fair, if not inevitable outcome of a neutral and non-manipulative process.

In short, definitions of gerrymandering of the sort just canvassed raise as many questions as they answer. To find

⁴ Engstrom, *Post-Census Representational Districting: The Supreme Court, "One Person, One Vote," and the Gerrymandering Issue*, 7 S.U.L. Rev. 173, 207 (1981).

⁵ Backstrom, Robins & Elder, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Minn. L. Rev. 1121, 1122 n.7 (1978); see also Erickson, *Malapportionment, Gerrymandering and Party Fortunes in Congressional Elections*, 66 Am. Pol. Sci. Rev. 1234, 1237 (1972).

⁶ Backstrom, et al., supra n.5 at 1129.

⁷ Grofman & Scarrow, *Current Issues in Reapportionment*, 4 Law & Pol'y Q. 435, 454 (1982).

⁸ Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in *Reapportionment in the 1970's*, 242, 274 (N. Polsby ed. 1971).

concrete meanings for various reformers' conceptions of gerrymandering, we must consider the specific criteria they have proposed for evaluating legislative districts. If those criteria cannot be demonstrated to be neutral and manageable standards with which to winnow out neutral from non-neutral plans, then they cannot justifiably be urged upon the judiciary as a technique for negotiating the treacherous terrain of the political thicket.

This brief will limit itself to what must surely be the central issue raised by the district court and other enthusiasts of judicial intervention in the partisan disputes of redistricting: whether manageable judicial standards exist for the task. It will demonstrate that there are, in fact, no neutral and judicially manageable standards for resolving competing partisan claims, independent of substantive political conceptions about the public interest and the proper distribution of power in our society.⁹

II.

THERE ARE NO JUDICIALLY MANAGEABLE STANDARDS FOR ADJUDICATING CLAIMS OF PARTISAN GERRYMANDERING

The principal reformist criteria for redistricting include the following:

1. Districts should be compact, according to any of several conflicting definitions of "compact".
2. Districts should unite persons having a "community of interest".

⁹ Some commentators have conceded the highly technical nature of some of their mathematical formulations and have even proposed that "the judiciary employ[] its own technician to interpret the data." Baker, *supra* n.3 at 140. But the problems transcend mere technique. We are not accustomed to look to computer programs and technicians as a source for political values. For an illuminating survey of the basic theories of democratic representation, see H. Pitkin, *The Concept of Representation* (1967).

3. Districts should preserve whole city, county or other political subdivisions "as much as possible".

4. Districts should be "marginal" or "competitive" in order to provide close or hard-fought inter-party contests.

5. Districts should be drawn so that in the next election each party's share of the total available seats will probably be closely or exactly proportional to its share of the cumulative vote.¹⁰

Section A, *infra*, considers the first three proposed criteria, which can be described as "formal" criteria; the remainder, appropriately described as "result-oriented" criteria, are dealt with in Section B, *infra*.

A. "Formal" Criteria Do Not Yield Judicially Manageable Standards.

1. Compactness.

No doubt the characteristic image brought to the minds of most people when they think of a "gerrymander" is that of the sprawling, odd-shaped, "contorted" district. Even some serious students of districting have clung to this notion. One writer referred to "outlandishly shaped districts" as the "classic tell-tale sign of gerrymandering."¹¹ The opposite of the "outlandishly shaped district", of course, is the "compact district". If indeed odd-shaped

¹⁰ For a much longer list of proposed criteria, see Grofman & Scarrow, *supra* n.7 at 454. Professors Grofman and Scarrow conclude that these criteria are "multiple and conflicting" and suggest that it will fall to the courts to resolve these conflicts. An important new study, B. Cain, *The Reapportionment Puzzle* (1984), contains a chapter, entitled "The Consistency of Good Government Criteria", that catalogues the various reformist criteria and systematically exposes the irreconcilable conflicts between them. *Id.* at 52 *et seq.*

¹¹ Wells, *Against Affirmative Gerrymandering*, in *Redistricting Issues*, *supra* n.1 at 84.

districts are the sure sign of gerrymanders, then the obvious way to prevent gerrymanders would be to require that districts be compact or, at a minimum, to require a careful explanation for any departure from compactness.¹²

The trouble with this seemingly attractive notion is that there is no basis for the assumption that odd-shaped districts signal gerrymandering, at least if that term is to retain its usual pejorative connotation. Most of the more sophisticated writers on districting have recognized that the presence or absence of compact districts cannot assure either the presence or absence of what they regard as gerrymandering.¹³ Compactness is a failure as part of any judicially manageable gerrymandering test.

The principal problems are fourfold. First, there is no credible empirical relationship between neat shapes and the "dishing" of political groups. Indeed, in 1973, this Court rejected challenges to a districting plan of unprecedented ugliness, whose very ugliness was the apparent result of an attempt to achieve partisan fairness. Second, rather than

¹² See, e.g., Weinstein, *supra* n.2 at 376-77.

¹³ See, e.g., B. Cain, *The Reapportionment Puzzle* 32-50 (1984) ("there is not only no necessary relation between aesthetic considerations and good government criteria, there is no happy empirical coincidence, either"); Backstrom, *et al.*, *supra* n.5 at 1125-27; Dixon, *supra* n.1 at 16; Engstrom, *supra* n.4 at 214; Grofman & Scarrow, *supra* n.7 at 454; Papayanopoulos, *Compromise Districting*, in *Redistricting Issues*, *supra* n.1 at 63; see also Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 Am. Pol. Sci. Rev. 540, 554 (1973).

More enthusiastic but less analytical supporters of compactness assert that the compactness requirement is neutral, but typically do not attempt to defend their assertion. E.g., Note, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. Chi. L. Rev. 398, 412 (1974) (hereinafter "*Political Gerrymandering*"). Even the enthusiasts of compactness often fall back to the weak assertion that it is a desirable "prophylactic measure". *Id.* at 414. But if compactness and "fairness" do not walk hand-in-hand, against what is compactness supposed to be a prophylaxis?

being neutral, compactness tends to disfavor groups, like the urban poor, that live in relatively homogeneous areas in which their highly concentrated votes are "wasted". Third, the literature on the subject includes numerous and indeed conflicting methods of measuring compactness, none of which has won general assent. Fourth, the criterion, however gauged, conflicts with other redistricting criteria, such as the preservation of city and county boundaries, communities of interest, and proportionality. No one has demonstrated any neutral or non-political technique for assigning priorities to or making trade-offs between these conflicting criteria and the political preferences that underlie them.

The notion that odd shapes are a reliable indicator of partisan cloak-and-dagger work is readily refuted by reference to the record in *Gaffney v. Cummings*, 412 U.S. 735 (1973).¹⁴ It was undisputed that the districts in that case were drawn to achieve what the state regarded as a politically "fair" result — rough proportionality between the number of seats won statewide by a party and the number of votes cast statewide for the several candidates of that party. 412 U.S. at 753-54. The "Single Appendix" filed in that case on November 24, 1972 includes twenty-four pages of maps depicting some of the "fair districts" in question. Single Appendix at 153-177. A brief look at those maps is instructive: they depict what are undoubtedly the most bizarrely shaped districts in recent apportionment history, making even the unusual shapes of the districts that this Court reviewed in *Karcher v. Daggett*, 462 U.S. 725 (1983), appear boringly regular.¹⁵

¹⁴ Significantly, Professor Dixon, the intellectual mentor of the redistricting reform movement, was counsel of record for the parties defending the plan and its "misshapen" districts.

¹⁵ For the Court's convenience, the districts are depicted in Appendix A of this brief.

Just as bizarrely shaped districts may be part of a "fair" plan, neat and regular districts can easily produce results that would fail various reformers' tests for fairness. New Mexico's Congressional districts are the very model of compactness,¹⁶ composed of neat, essentially rectangular county units. In the 1982 Congressional elections, Democrats "carried" the state with 51.37%¹⁷ of the two-party vote; yet this majority won the Democrats only 33.33% of the available three seats, yielding what some reformers would call an 18% "gulf" between seats and votes won. Utah, too, has compact Congressional districts that dutifully trace county lines.¹⁸ In the 1984 elections, however, Democrats won 34.95% of the two-party vote, but were completely shut out of representation in Utah's all-Republican delegation of three Congressmen. *Congressional Quarterly*, April 13, 1985 at 695. Compactness is quite consistent with results which, in the reformers' terms, leave almost 35% of a state's population "without representation".¹⁹

The essential flaw of the compactness criterion can be seen by imagining a three-by-three grid of nine perfect squares. The nine-district jurisdiction enjoys a political life far simpler than any to be found in the United States; it includes only two salient political groups, the A's and the B's. There are 50 A's and 40 B's. It so happens that as a result of the "natural" or "fortuitous" distribution of the

¹⁶ The Census Bureau's map of the New Mexico districts is reproduced in Appendix B.

¹⁷ These statistics are compiled from the 1983 Congressional Quarterly.

¹⁸ The Census Bureau's map of the Utah districts is reproduced in Appendix C.

¹⁹ Amici are not asserting that these plans are in fact "gerrymanders." But as one political scientist observed: "A committee (of any composition) may comply with all the rules of compactness, contiguity, and such, and still create a masterful gerrymander." Papayanopoulos, *supra* n.13 at 63.

A's and B's, the A's tend to live in clusters while the B's are more evenly distributed across the landscape. The gridwork creates districts populated as follows:

District 1: 4 A's, 6 B's	District 6: 4 A's, 6 B's,
District 2: 9 A's, 1 B	District 7: 4 A's, 6 B's
District 3: 4 A's, 6 B's	District 8: 9 A's, 1 B
District 4: 4 A's, 6 B's	District 9: 4 A's, 6 B's
District 5: 8 A's, 2 B's	

Assuming that everyone votes, the result of the neat grid of districts is that the B's secure a two-to-one majority of representatives with a minority of the votes. For a mere 44.5% of the vote, they get 66.6% of the seats. The unfortunate A's get 55.5% of the votes, but only 33.3% of the seats. Thus the relationship between compactness and legislative outcomes depends entirely on the fortuity of the pre-existing geographical distribution of voting groups. Unsurprisingly, the B's will be quite satisfied with a test that makes lack of compactness a constitutional infirmity.

But it would be naive to call the distribution of groups in society a fortuity. As a result of social, economic and political forces, the typical distribution of political units in the United States, especially in the larger industrial states, includes inner city areas with overwhelmingly Democratic, poor and minority populations, and suburban and rural areas that are largely Republican, although not by such clear margins. In the language of redistricting reformers, then, compact districts in urban centers "waste" urban votes by "packing" them into relatively homogeneous districts when "bizarrely shaped" districts linked to outlying areas would make it possible not to "waste" these votes. Similarly, "sprawling districts" can unite separate areas of minority strength into a district where their collective strength can influence an election. See, e.g., B. Cain, *The*

Reapportionment Puzzle, 46-50 (1984).²⁰ Whether it is desirable to do so, of course, is purely a political question. Indeed, that is precisely the point: compactness is not a neutral criterion and constitutionalizing it would have readily predictable political consequences. To paraphrase George Orwell, compactness is more equal for some people than others.

Even if one were to accept the naive notion that compactness is a neutral criterion that does not express a political preference, there is simply no agreement among reformers about how to determine whether districts are compact. Among the various measures that have been proposed are: (1) the Schwartzberg "adjusted perimeter" test;²¹ (2) the Roeck "smallest circle" measure;²² (3) the Weaver-Hess "moment of inertia" measure;²³ (4) the Boyce-Clark "center of gravity" measure;²⁴ and a score of others. The differences between these proposed measures are not merely technical. Different measures yield quite conflicting results; the Boyce-Clark measure, for instance, gives a high rating to a coiled, snake-like district that would be censured by a "perimeter" measure, while the Roeck "smallest circle" test would reject the same isosceles triangle that would win high marks from a perimeter test.

²⁰ See also Lowenstein & Steinberg, *supra* n.2. The problem, of course, is not limited to urban or minority groups. "[T]he most innocent districting plan will penalize a party whose voters are either inordinately concentrated (like Michigan Democrats) or inordinately dispersed (like Missouri Republicans)." Mayhew, *supra* n.8 at 276; see also A. Hacker, *Congressional Districting*, 56-57 (1964).

²¹ Schwartzberg, *Reapportionment, Gerrymanders and the Notion of Compactness*, 50 Minn. L. Rev. 443 (1966).

²² Roeck, *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 Midwest J. of Pol. Sci. 70 (1961).

²³ Weaver & Hess, *A Procedure for Non-Partisan Districting: Development of Computer Techniques*, 72 Yale L.J. 288 (1963).

²⁴ Boyce & Clark, *The Concept of Shape in Geography*, *Geographical Rev.* 561 (1964).

If lack of compactness is grounds for haling a redistricting plan into court, the choice of measure will itself decide which plans will be subjected to litigation. Compactness thus is so vague a redistricting value that even its proponents commonly propose that it must not be "rigidly" applied. Such a vague concept is incapable of providing the judiciary with a manageable path through the political thicket.

Finally, the compactness criterion inescapably conflicts with other reformist redistricting criteria. It has already been seen that compactness can conflict with proportionality. Similarly, although city and county boundaries are notoriously irregular,²⁵ reformers insist that districts follow these boundaries but also be compact. These objectives cannot be achieved simultaneously. Compactness further will conflict with the notion that districts should comprise communities of interest. Even if there were some non-political method for deciding which citizens share common interests, it takes little reflection to see that interest communities generally fail to confine themselves to boxes, circles or whatever compact shape a reformer might prefer. "No natural law ordains that people with community ties

²⁵ E.g., *Gaffney v. Cummings*, *supra*, 412 U.S. at 753 n.18 ("any plan that attempts to follow Connecticut's 'oddly shaped' town lines . . . is bound to contain some irregularly shaped districts.") The California example is also instructive: "The city of Industry looks like the hull of a boat. The city of Monrovia has a narrow appendage with less than a hundred people in that is connected to the main body of the city by a drainage ditch. The City of Los Angeles itself is connected to its port area in San Pedro by a narrow corridor that skirts the cities of Carson and Torrance. Pasadena has stovepipe extension to the north which protrudes up through a reservoir area into unincorporated county land. Commerce, like the city of Industry, is a largely unpopulated industrial area with many jagged sides. The city of Riverside is a mosaic that rivals the most creative efforts of gerrymanderers over the years. This list could be indefinitely extended." B. Cain, *The Reapportionment Puzzle* 46 (1984).

live in areas of regular geometric shape." Mayhew, *supra* n.7 at 273.²⁶

A compactness standard, in short, is a resounding failure as a judicial technique for identifying and remedying partisan gerrymanderers.²⁷ Its principal failure is its very lack of neutrality. This basic failure is compounded by its utter vagueness and its conflict with other proposed redistricting values. A vague compactness criterion, to be considered with other vague and conflicting criteria, threatens to result in courts making, or being accused of making, purely political rulings with only the thinnest veneer of neutral guiding principles. The "classic tell-tale sign of gerrymandering" is a classic red herring.

2. Communities of Interest.

Redistricting reformers are fond of saying that districts should be composed of "communities of interest". This criterion suffers from two principal weaknesses. The first is that, like compactness, the concept is so vague and resistant to definition as to provide no practical guidance to courts; the second is that, even if agreement could be forged about who has common interests with whom, ordering the competing and conflicting claims of various groups who want to share common districts would entail intractable political questions.

²⁶ For a complete catalogue of these conflicts, see Lijphart, *Comparative Perspectives on Fair Representation: The Plurality-Majority Rule, Geographical Districting, and Alternative Electoral Arrangements*, in *Redistricting Issues*, *supra* n.1 at 147-52 (hereinafter "Comparative Perspectives").

²⁷ Compactness is sometimes defended as helping to facilitate contacts between a representative and his constituents. But given the ease with which Americans move about today, the size or shape of districts is hardly an impediment to contacts with representatives; in any case, most contacts today occur by telephone or through the franking privilege. B. Cain, *The Reapportionment Puzzle* 32-33 (1984).

On a given political issue at a particular point in time, it may indeed be possible for the judiciary to state with some confidence that certain groups share a community of interest. But once one recognizes that myriad different groups align in myriad different ways on the diverse political issues that arise between decennial redistrictings, the usefulness of the concept ends.²⁸ Do adjacent low-income black and white neighborhoods comprise a single community of economic interests or two communities defined by diverse racial and social features? Are agricultural areas univocal political communities, or do growers and laborers have divergent interests? If a group has common interests in one area of political life but conflicts in others, should the members of the group be corralled in a single district? Does a single municipality in transition from rural agricultural use to a bedroom community for a nearby city constitute a single interest? Is preserving a municipal unit more important than recognizing the diverse interests it comprises? And what is to be made of the fact that many, if not most, political "communities" are scattered across distant parts of a state? "Emphasizing community can . . . violate the compactness standard. No natural law ordains that people with community ties live in areas of regular geometric shape." Mayhew, *supra* n.8 at 273. "There is, in short, a trade-off between community and each of the other districting values." *Id.* at 273.

Even assuming a neutral or judicially manageable test for identifying and preserving communities of interest, the very assumption that such communities should have common representation hides an important political judgment. Although it is possible to argue that a district composed

²⁸ See, e.g., Ladd, *The Concept of Community: A Logical Analysis*, in *Community* 272-73 (C. Friedrich ed. 1959) ("[T]here is no single criterion of membership or specific practical consequence thereof which can be used to define 'community' in the practical sense.")

predominantly of one group can be represented most effectively because its mandate to its representative will be clearest,²⁹ it is equally possible to argue that districting should "immunize the extent to which any representative is able to rely solely on a single interest group for his support," so that the representative will have to rely on a coalition of groups, making him likely to be at once more moderate and more independent of the demands of any one group. Note, *Political Gerrymandering*, *supra* n.14 at 401. The Constitution does not contain any formula for choosing between these competing views about political representation.³⁰

3. Municipal Boundaries.

Avoiding "excessive"³¹ splits of city, county and other governmental units is an often-stated goal of districting reformers. As a neutral criterion for judicial evaluation of districting plans, however, this goal fails since, like other such criteria, it is unmanageable³² and masks political judgments more properly left to the legislative realm.

²⁹ E.g., Mayhew, *supra* n.8 at 271-73.

³⁰ The Indiana Democrats in this case, of course, complain that too many of them were packed into two few districts. Thus, they regard too much community of interest as too much of a good thing.

³¹ It is well-recognized that there is an inherent tension between the constitutional requirement of equal population and the state policy of maintaining whole city, county and other municipal units. E.g., *Mahan v. Howell*, 410 U.S. 315, 325 (1973); *Reynolds v. Sims*, *supra* p.4, 377 U.S. at 579-81 (1964). Especially in the post-Karcher era, splits of cities and counties are inevitable.

³² The desire to main whole cities and counties within district boundaries can conflict with (1) the equal population requirement, (2) compactness, (3) the maintenance of communities of interest, (4) preservation of minority voting strength, (5) proportionality, (6) the creation of competitive seats, and other criteria. See generally Lijphart, *Comparative Perspectives*, *supra* n.26 at 147-52; see also B. Cain, *The Reapportionment Puzzle*, 69-73 (1984).

The principal justification advanced for preserving whole cities, counties and other governmental units within districts is that these units have common interests which should not be submerged by spreading the unit's voting power over more than one district. B. Cain, *The Reapportionment Puzzle* 60-63 (1984). Quite apart from the empirical weakness of this assumption,³³ pursuit of this goal embodies a political judgment that enjoys no *a priori* justification.

Assume for the moment, however, that a commonality of interest exists within a local governmental unit's boundaries. If the unit can be placed within a single district and closely approaches the ideal district population, it is indeed likely that the representative of the resulting district will be highly responsive to the political wishes of the unit. If the unit is divided into two districts, the legislators representing the districts will also be responsive, but perhaps less raptly so. Is the unit more influential when its political interests are intensely pursued by a single legislator, or when pursued somewhat less single-mindedly by two? "[W]hether a city or county is made worse or better off by being divided depends upon the trade-off between a potentially lower level of legislative responsiveness and the benefit of having additional channels of representation." B. Cain, *The Reapportionment Puzzle* 62 (1984). The desirability of such a trade-off is a political question.

The desire to maximize the influence of local governmental units is, moreover, relevant principally when a proposed piece of legislation affecting the unit is controversial. Necessarily, then, there will be some group or groups that

³³ The basic assumption that the residents of a political subdivision will have a collective common interest is dubious. Deep, divisive intra-city and intra-county conflicts are a well-known fact of political life. Indeed, city and county governments elected at large have been criticized for submerging these conflicts.

oppose the legislation and who have interests adverse to those of the governmental unit. Thus, concentrating the unit's voting strength in a single district may well favor one political group over another.

Formal criteria fail as techniques for adjudicating the competing claims of partisan political groups. The vagueness of the concepts and the conflicts between them assure that decisions based on them will lack any coherence or consistency, thus opening the federal courts to charges of judicial gerrymandering. And, vague or not, all criteria embody political judgments of their own — judgments of a nature that are undoubtedly best left to our pluralist political process. The question remains, then, whether the reformers' "result-oriented" tests hold out any hope for plotting a judicial path through the political thicket.

B. "Result-Oriented" Criteria Also Fail As Neutral Judicial Criteria for Identifying and Remedying Partisan Gerrymandering.

The preceding section discussed several formal criteria that reformers and political scientists have proposed as redistricting values that should be constitutionalized or used as indicia of unconstitutionality. But another school of reformers and political scientists eschews these formal criteria, finding them to be essentially naive. The perceived problem with these criteria is their emphasis on the characteristics of individual districts, rather than with how a set of districts translates the individual votes cast in the districts into a set of representatives. In this respect, these political scientists would argue, the focus of formal criteria is all wrong. The purpose of legislative districting, after all, is to elect members of a legislative body. To them, the

character of individual political districts is far less significant than the political composition of the resulting legislature.³⁴

But result-oriented criteria have problems of their own. Some proposed criteria are instrumental; they require districting that will make the representative system function in a manner deemed desirable by the proponents. The difficulty is that, although the goals established may be plausible, there are usually equally plausible reasons for seeking the opposite goals. Disputes over such goals are undeniably important; the question remains, however, whether they should be resolved politically or by the courts. Other result-oriented criteria do not seek to serve any instrumental purposes other than assuring a system in which the election results "properly" reflect the votes cast. Again, however, many different theories exist about the proper relationship of districts to the representatives they elect, none of them enjoying any distinctive constitutional supremacy. Moreover, such goals are fundamentally inconsistent with our system of geographically based winner-take-all districts and, as many of the proponents of such criteria themselves have recognized, lead ineluctably to the conclusion that the United States should abandon its present system of representation in favor of a system with proportional representation like that used in some Continental democracies.

This section will deal primarily with the ideal of "proportionality", an ideal that underlies, explicitly or tacitly, every proposal for laying political redistricting disputes at the judicial threshold. However, before treating the problems of proportionality, this section will first assess another result-oriented criterion on which the district court

³⁴ The leaders of the result-oriented school include Professors Grofman, Niemi and Scarrow. Some of their principal publications are listed in the bibliography to *Redistricting Issues*, *supra* n.1.

relied: "competitiveness". While competitiveness is not so ambitious a goal as proportionality, it nonetheless reflects important political judgments and is not susceptible of coherent judicial management.³⁵

1. Competitiveness.

Many reformers have proposed that districts should be drawn so as to engender hard-fought inter-party contests. The absence of such competitive districts is sometimes said to be a sign that gerrymandering is afoot.³⁶ Whatever the merits of the proposal as a matter of politics, it fails as a manageable judicial standard for resolving partisan redistricting conflicts.

One of the principal difficulties with constitutionalizing competitiveness can be seen by examining a hypothetical state in which the "normal" vote division between the two parties is approximately even. In such a state, it should be possible, assuming one is not bound by formal criteria other than population equality, to create a plan consisting entirely of highly competitive districts. Suppose further that in the first year of the plan, there is a modest but clear Democratic trend throughout the state. Since by hypothesis all the districts are designed to split evenly in a "normal" year, the result is likely to be that Democratic candidates win by small margins in the overwhelming majority of districts. Suppose that in the next election, there is a Republican trend of about the same strength. The legislature is likely to swing from being overwhelmingly Democratic to overwhelmingly Republican. Most political commentators have regarded it as a strength of our

³⁵ For a more detailed discussion of the infirmities of these and other result-oriented criteria, see Lowenstein & Steinberg, *supra* n.2.

³⁶ The district court apparently concluded that the Indiana districting plan contained inadequately competitive districts, Appx. to Juris. Stat. at A-12, though the court's discussion of the topic is cursory at best.

system, however, that we avoid such violent fluctuations and that the minority party is generally assured a substantial presence in the legislature in all states in which there is a genuine two-party system. See, e.g., B. Cain, *The Reapportionment Puzzle* 50 (1984). From this perspective, a districting plan that maximized competitiveness would be seriously contrary to the public interest.

Commentators have recognized other reasons for not constitutionalizing the competitiveness criterion. Competitiveness does not come without cost. In one sense this statement can be taken literally; the more competitive the district, the more need the candidates will feel to spend, and therefore to raise, enormous amounts of campaign money, with all the attendant problems. *Id.* at 68; see Jacobson, *Money in Congressional Elections* (1980). Another cost may be in the quality of representation. Although we generally want legislators to be responsive to public opinion, a legislator in an insecure district may be tempted to carry this virtue to excess. The result may be an unwillingness to take principled or far-seeing stands, excessively parochial concern with the district to the detriment of the state or nation as a whole, and preoccupation with raising "special interest" money at the expense of attention to legislative duties. Moreover, a state concerned with effective representation may have a significant and legitimate interest in maintaining at least some incumbents in office, especially those who have achieved a measure of power or influence in the legislative body to which they are sent. See B. Cain, *The Reapportionment Puzzle*, 12-15.

If the presence of "some" competitive districts were elevated into a constitutional criterion for the validity of a plan, the first question that would arise would be "how many?" There is no obvious constitutional answer to this question. Answering it will be greatly complicated by the extreme difficulty of counting the competitive districts in

an actual districting plan. The competitiveness of a district depends on many factors, many of which cannot be known with certainty when the plan is adopted. The percentage of registered voters in each party and the voting history of the district are undoubtedly important factors, but they do not by themselves indicate which districts will be competitive. A factor of great importance is the incumbent, who usually has significant advantages and is likely to run well ahead of what would be predicted for his party if registration and voter history alone were considered. But the incumbent may be much stronger in some areas than others. The strength of the challenger is also an important factor, but may not be known when the plan is adopted. An exceptionally skillful or inept campaign on one side or the other, or other events such as an unexpected scandal or a new issue may render a competitive district safe or vice-versa. Until these unknowns are known, which is necessarily after the plan is drawn, it is meaningless to talk of most districts as either safe or competitive.²⁷ See B. Cain, *The Reapportionment Puzzle* 67-68 (1984). Thus, the assessment of the degree of competitiveness of a redistricting plan is at most an art, rather than a science, and the application of the art to resolve partisan redistricting conflicts involves inescapably political judgments.

2. Proportionality.

It was observed earlier that proposals to have the judiciary police partisan vote "dilution" depends on the existence of an at least implicit standard from which to measure dilution. For the court below, as well as for many commentators, that standard is proportionality. In one of his last papers, Professor Dixon opined that for parties to win

²⁷ The district court was either unaware of or undeterred by these difficulties. It concluded that a race in which the results are in the "45-55" percentage range is competitive. Appx. to Juris. Stat. at A-12.

seats "roughly proportional to their share of the popular vote . . . is the very core of the term fair representation." Dixon, *supra* n.1 at 9. But as many writers have observed, the winner-take-all district system of elections, unlike the proportional representation systems in use in some foreign democracies,²⁸ by its very nature looks to a number of separate contests and is thus fundamentally opposed to any concept of adding up national or statewide vote totals. "[T]o compare the results of elections under our system with a proportional ideal is simply 'to superimpose one system of representation upon the structure of another.' " Engstrom, *supra* n.4, at 215-16. Thus, there is a fundamental tension between our present political structure and the very core of the representational reform many commentators seek. Increasingly, commentators have come to recognize this tension, recognizing that it is not gerrymandering, but our very system of representations that is in conflict with the proportionality ideal. Professor Dixon admitted that:

A paradox of the one-man, one-vote revolution is that we now perceive our goal to be something approaching a proportional result, in terms of group access to the legislative process. But the district method itself, when combined with straight plurality election, is the source of many problems.²⁹

Elsewhere, he concluded that proportional representation "may be the only way of making good on one-man, one-vote, if that is interpreted: one-man, one-vote, each vote to

²⁸ Justice Douglas' dissent in *Wells v. Rockefeller*, 376 U.S. 52, 59-67 (1964), contains an intriguing discussion of the Lebanese and Indian experiences with proportional representation.

²⁹ Dixon, *The Court, the People, and "One Man, One Vote"*, in *Reapportionment in the 1970's* 13 (N. Polsby ed. 1971).

be as *effective* as possible.”⁴⁰ Other commentators have reached the same conclusion. Professor Pennock has called proportional representation “the logical extension of the one-person, one-vote ideal.” J. Pennock, *Democratic Political Theory* 358 (1979); *see also* Note, *The Constitutional Imperative of Proportional Representation*, 94 Yale L.J. 163 (1984).

If this is so, then the reformers’ view of the one-person, one-vote ideal will require a revolution in the system of representation in the United States. The Constitution of course contains no charter for a judicial implementation of the revolution. Proportionality, however desirable as a political goal, is inconsistent with our present system, and cannot even begin to lay claim to being a manageable judicial standard for resolving partisan redistricting disputes.

It is commonly supposed that in the absence of gerrymandering, it is natural and in the long run even inevitable that the seats/votes relationship will be proportional. *See, e.g.*, testimony of David Wells and David Cohen at U.S. Senate hearings, quoted and described in Grofman, *For Single-member Districts Random is Not Equal*, in *Redistricting Issues*, *supra* n.1 at 55. Accordingly, the fact that a particular plan produces disproportionate results is commonly pointed to as compelling evidence of gerrymandering. The appeal of the proportionality test is no doubt explained by this notion of its naturalness as well as by its simplicity.

Notwithstanding its popularity, the proportionality criterion has been rejected as unrealistic virtually without exception by every scholar who has seriously considered the

⁴⁰ Dixon, *supra* n.3 at 525. It appears that Professor Dixon ultimately settled on the bi-partisan commision as the vehicle for redistricting reform. *See* Dixon, *supra* n.1.

question. *E.g.*, Backstrom, *et al.*, *supra* n.5 at 1134; Baker, *supra* n.3 at 21; Dixon, *supra* n.1 at 9; Engstrom, *supra* n.4 at 175 n.8; Grofman, *For Single-Member Districts Random Is Not Equal*, in *Redistricting Issues*, *supra* n.1 at 55; Tufte, *supra* n.13. The reason is that far from being natural, a proportional outcome in a system of single-member, winner-take-all districts can be expected to occur only when supporters of each party are segregated into separate districts to a far greater degree than is likely, given American political geography. Under conditions of anything like normal dispersion of party support, a party that wins a majority of the votes will win a disproportionately large percentage of the seats.⁴¹

The underlying demographic reality is that, whatever may be a given group’s statewide concentration, only its relative concentration within the local district area determines whether it will be able to carry the district. If a minority group is randomly distributed, the likelihood that it will have a local majority concentration, and hence the likelihood that it will carry any district, falls rapidly. Groups whose statewide strength is twenty percent or less may well carry no seats at all. In a perfectly even distribution, a minority group gets zero seats. Thus, the principal underpinning of the proportionality criterion — its supposed naturalness — turns out to be a chimera.

This uselessness of the proportionality standard as a measure of gerrymandering is borne out in practice. The Congressional districts used in Illinois and Minnesota for the 1984 elections were court-approved plans, presumably free of any attempt to “dish” partisan groups. *In re Illinois Congressional Districts Reapportionment Cases*, No. 81 C 3915 (N.D. Ill. Nov. 23, 1981), *aff’d mem.*, 454 U.S. 1130

⁴¹ The leading study in this area is Kendall & Stewart, *The Law of the Cubic Proportion in Election Results*, 1 Brit. J. Soc. 183 (1950).

(1982); *LaComb v. Growe*, 541 F.Supp. 145 (D. Minn.), appeal dismissed sub nom. *Orwoll v. LaComb*, 456 U.S. 966 (1982). Nonetheless, the election results were distinctly disproportional. In Illinois, Democrats won 51.7% of the statewide vote, but 59.1% of the seats. Minnesota Republicans won 50.1% of the statewide votes, but only 37.5% of the available seats.⁴² Similarly, in 1967 then-Governor Ronald Reagan signed⁴³ a California Congressional redistricting plan that in 1968 gave Republicans only a 44.7% minority of the Congressional seats for a 55.2% majority of the cumulative vote.⁴⁴ Was Ronald Reagan a Democratic gerrymanderer?

A proportionality test conflicts not only with our present district-based system, but also with the fact that districts must be based on equal numbers of persons, not voters. See *Burns v. Richardson*, 384 U.S. 73 (1966).⁴⁵ Voter turnout is independent of district population. The smaller the voter turnout in a district, of course, the fewer votes needed to win.⁴⁶ If one political party consistently has more strength than another in areas with low voter turnout, it will be able to secure more seats with fewer votes. This, however, is a far cry from proof of gerrymandering. As Professor Cain

⁴² The statistics are taken from the *Congressional Quarterly*, April 13, 1985 at 691, 692.

⁴³ Governor Reagan did not hesitate to veto redistricting legislation he found unfair. See *Legislature v. Reinecke*, 6 Cal. 3d 595, 602 (1972).

⁴⁴ These statistics are compiled from Secretary of State, *Statement of the Vote, State of California General Election November 5, 1968* 15-18.

⁴⁵ Proportionality enthusiasts almost invariably insist on proportionality between seats and votes, but other measures of proportionality could also serve. In *Gaffney v. Cummings*, Connecticut had attempted to create proportionality to estimates of general statewide political strength. Proportionality to recent voter registration could also be used.

⁴⁶ It should also be remembered that, as in this case, there are often races in which candidates run unopposed. Such races obviously skew any seats/votes analysis.

has observed: "There is no reason to expect that a standard of political fairness based on the ratio of seats to votes will correspond well with redistricting by population." B. Cain, *The Reapportionment Puzzle* 75 (1984).

Nor are these considerations without important political ramifications. Voter turnout in a district depends on, among other things, the number of persons below voting age, the number of resident aliens, and the number of persons who simply do not vote. These factors, in turn, are affected by social, economic and cultural factors. The ratio of voters to total population is lowest in low-income areas and areas with high concentrations of racial and ethnic minorities. *Id.* at 75-76. This Court has noted that in some states, Congressional districts vary by as much as 29% in age-eligible voters. *Gaffney v. Cummings*, 412 U.S. 735, 747 (1973). And, as the Court noted in *Burns*, the principle of districting by population rather than number of voters is an important protection for relatively weak groups that have often been the victims of past discrimination. *Burns, supra*, 412 U.S. at 92-93. Such groups are unlikely to see proportionality as a fair or neutral standard.

Quite apart from its serious analytic flaws and its predictable political results, a proportionality standard is simply incapable of practicable administration, judicially or otherwise. The basic problems are twofold. First, proportionality enthusiasts always posit only two political parties; hypothetical redistricting schemes designed to achieve proportionality between two parties are relatively simple to construct, at least in the context of academic writings. But if every "identifiable" political group is entitled to judicial protection in the redistricting process, then proportionality will be impossible to achieve, since memberships in these groups will often overlap. Achieving proportionality for a minority racial group, for instance, may well conflict with proportional representation for a religious group. See

United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977). The religious group, in turn, is likely to comprise both Republicans and Democrats, as well as opponents and proponents of other political interests, all of whom will insist on electing representatives in numbers proportional to their voting strengths. The prospect of resolving these competing claims in a federal courtroom is a singularly unappealing prospect.

Second, the proportionality of a redistricting plan cannot be known until an election has been held under it, at which time it will be possible to tally votes and seats won. Thus, in order to apply a proportionality test to a set of districts challenged before they have been used in an election, the courts would have to engage in political prognostication — a notoriously treacherous enterprise. See, e.g., *Kilgarlin v. Martin*, 252 F. Supp. 404, 433 (S.D. Tex. 1966) (“only demonstrable way available to fathom the political inclinations of a certain area at any given time is at the ballot box on a given election day”), *aff’d in part sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967).

Proportionality has an undeniable appeal, yet is inconsistent with the very nature of our system of representation. This inconsistency and the consequences that flow from it render proportionality useless as a standard for evaluating claims of partisan gerrymandering. This tension, of course, is no reason to reject exploration of the idea, which has recently been the subject of interesting commentary. That exploration, however, clearly belongs in the political realm and not in the realm of constitutional mandate.

III.

CONCLUSION

It has not been the intent of this brief to deny that the redistricting process often provides an unedifying view of

raw partisanship at play in our legislatures, or to argue that all reforms are unworthy of consideration. Any political system as vital as our own must be open to criticism and reform, however much it may disturb the status quo. The question, however, is which institutions are best suited to such tasks. Partisanship and tough politics manifest themselves in many forms; proposals to counter these manifestations abound, yet only the most committed activist would suggest that it is the federal judiciary that should bear the burden and uncertainties of reform.

Redistricting reform is no stranger to the political process. From time to time, Congress has seen fit to impose statutory compactness and contiguity requirements on the state legislatures that draw Congressional districts. Many states, by statute, constitutional amendment or by popular initiative have attempted to tame the process by experimenting with bans against odd-shaped districts and dividing municipal units or communities of interest. These attempts have met with varying degrees of popular acclaim. Some states permit an aggrieved political party to subject a disfavored redistricting plan to a statewide referendum vote. In 1982, such a campaign, led by President Reagan and the Republican National Committee, struck down a California Congressional redistricting plan. Other states have followed Professor Dixon, and have abandoned the “neutral standards” approach entirely, trying instead to remove politics from the process by removing the process itself from the political arena to non-partisan or bi-partisan commissions. Some local jurisdictions have even experimented with proportional representation systems. The federalist system of government embodied in the Constitution of the United States invites this kind of experimentation and reform in politics.

The Constitution, however, does not contain any directive to the judiciary to harness what are seen as partisan

excesses in redistricting. It is true that this Court has intervened to secure the principle of equipopulous districts. But management of that purely arithmetic requirement is a far cry from management of the conflicting representational aspirations of the myriad political interest groups that populate those districts. As this brief has demonstrated, neutral and manageable standards for judicial application no more exist in this area than they do in any other area of conflict whose resolution has traditionally been left to our political process.

The unanimous words of this Court in *Gaffney v. Cummings* are peculiarly appropriate to the principal issue presented by this appeal. The adjudication of partisan redistricting disputes is a "vast, intractable reapportionment slough." The Court should not mire itself in that slough.

Dated: May 9, 1985.

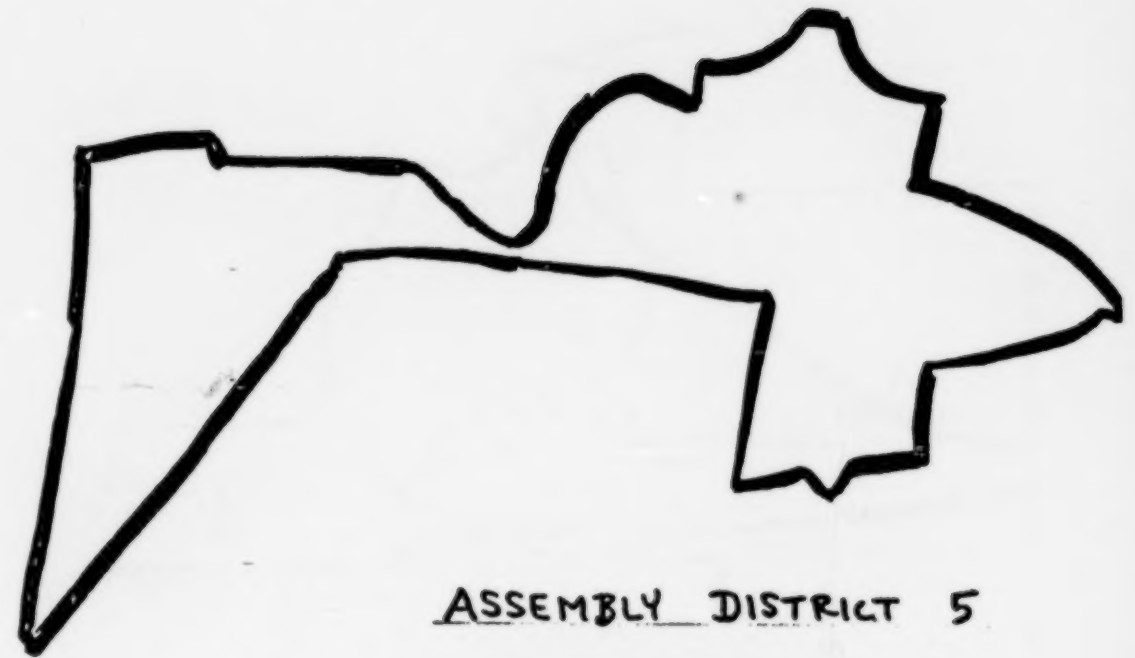
Respectfully submitted,

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1a



ASSEMBLY DISTRICT 5

BOARD PLAN

————— 1/2 MILE

H-5

Appendix A

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ASSEMBLY DISTRICT 12

BOARD PLAN

— 1/2 MILE

H-12

3a



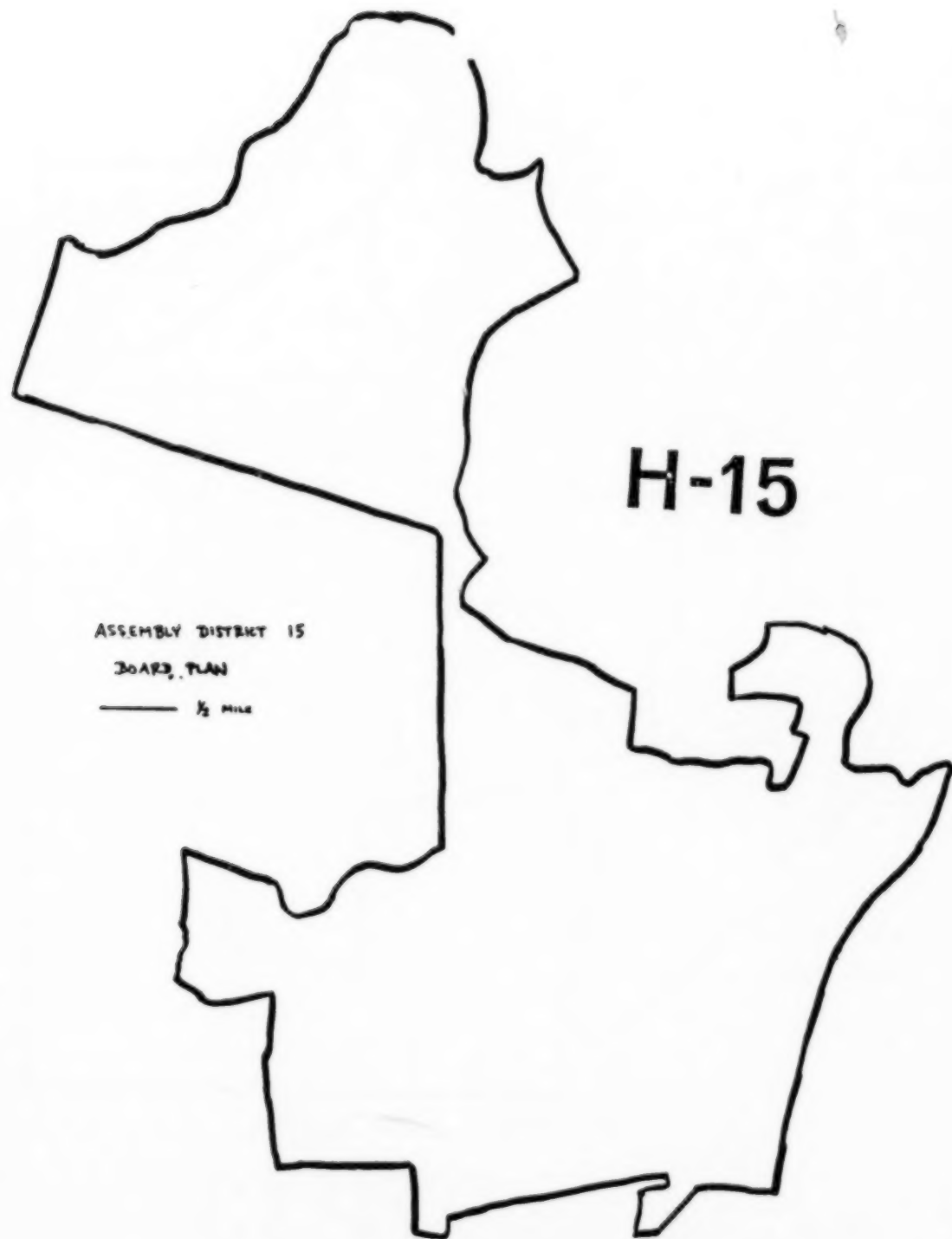
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BOARD PLAN

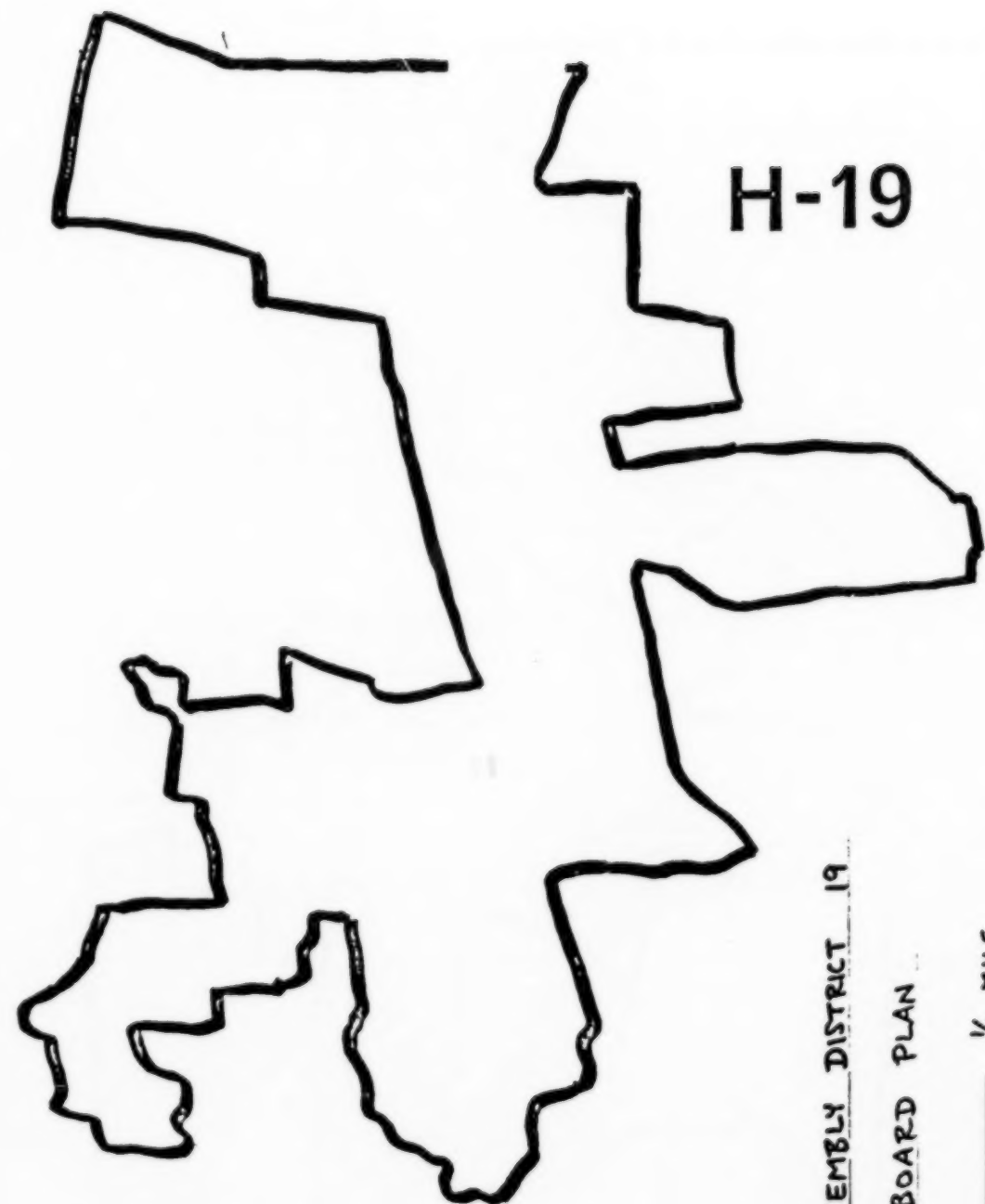
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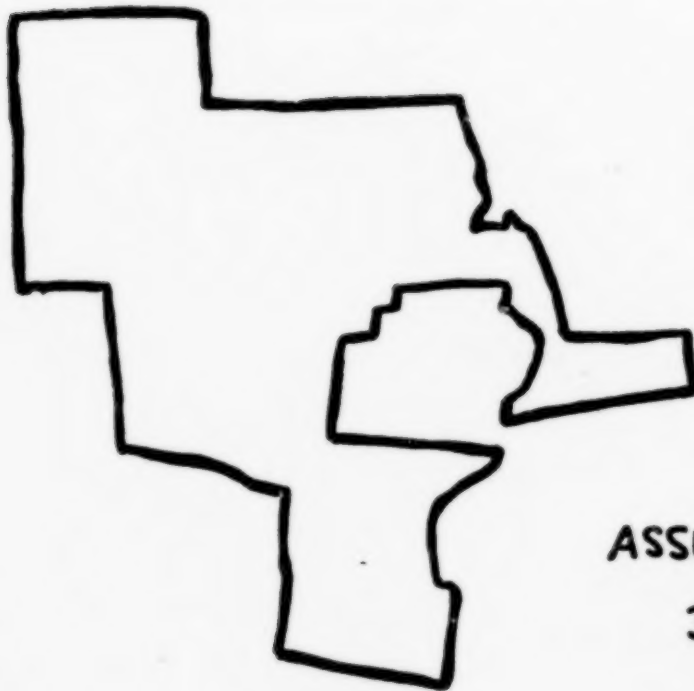
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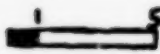
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8a



ASSEMBLY DISTRICT 5
BOARD PLAN

 5 MILES

H-50

9a

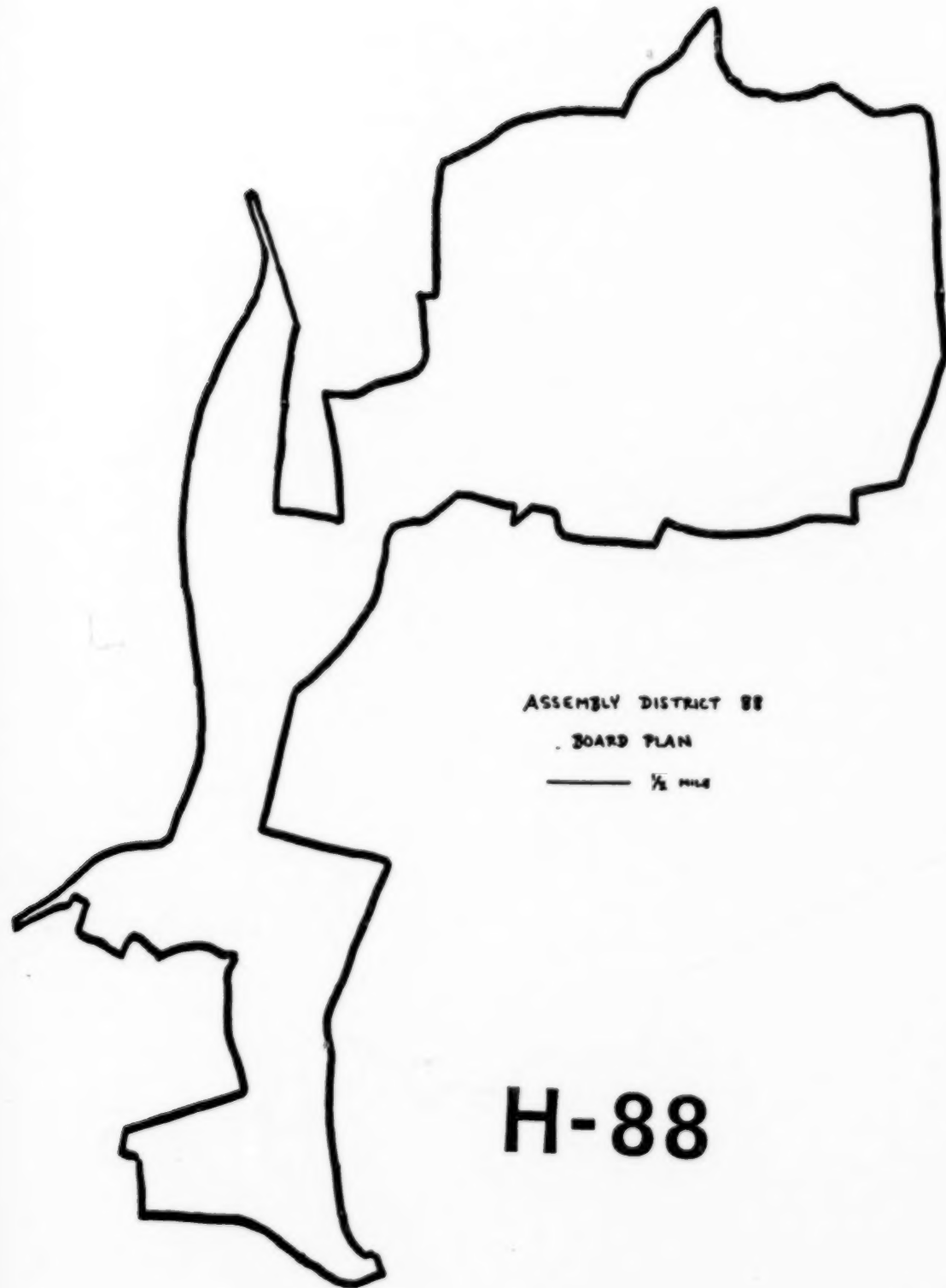


ASSEMBLY DISTRICT 85
BOARD PLAN

 1/2 MILE

H-85

10a



ASSEMBLY DISTRICT 88

BOARD PLAN

— 1/2 MILE

H-88

11a



ASSEMBLY DISTRICT 104

BOARD PLAN

— 1/2 MILE

H-104

12a



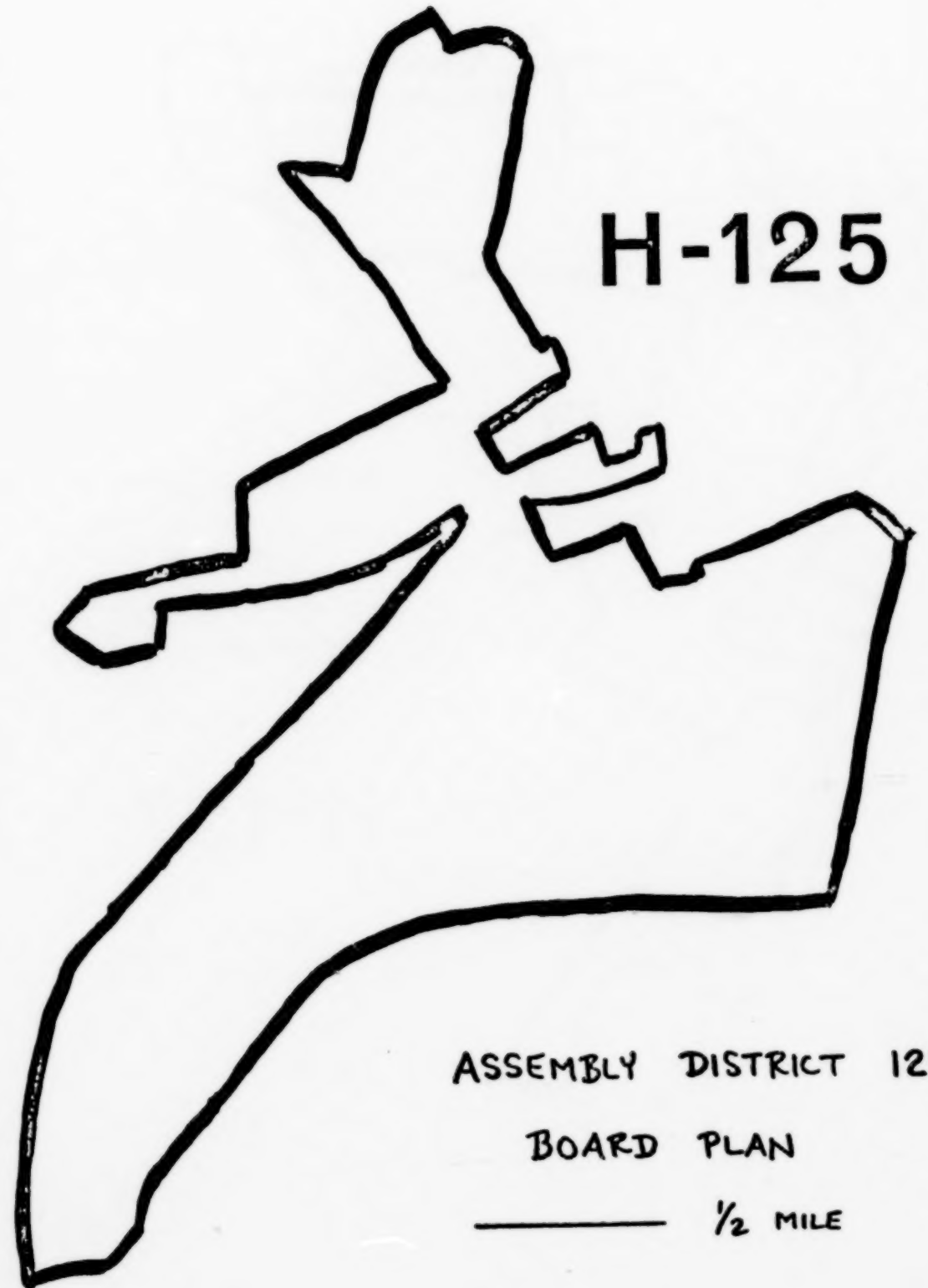
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BOARD PLAN

— 1/2 mile

H-122

13a



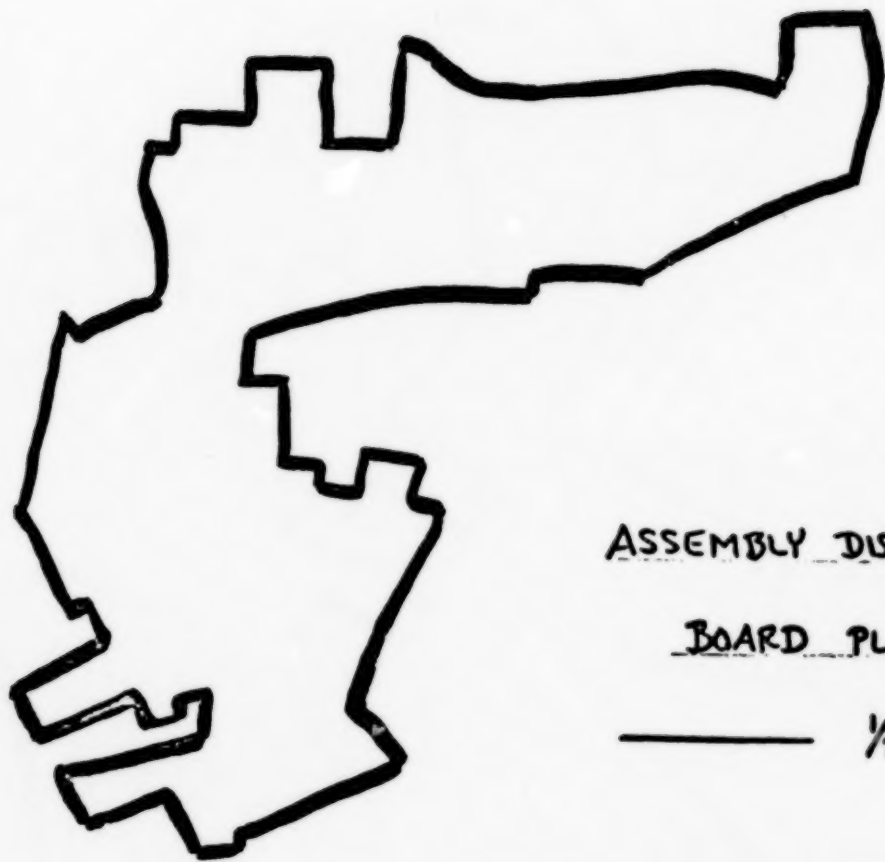
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ASSEMBLY DISTRICT 125

BOARD PLAN

— 1/2 MILE

14a



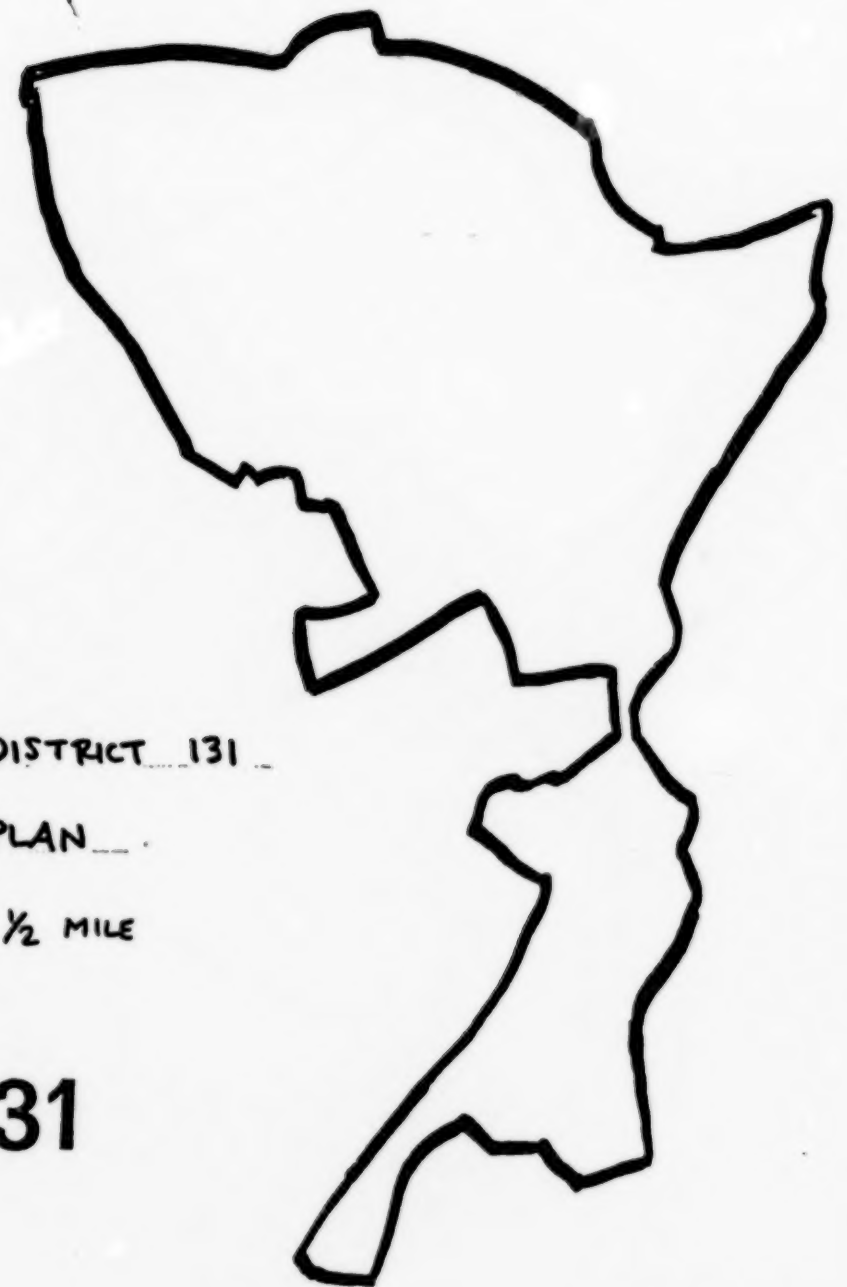
ASSEMBLY DISTRICT 127

BOARD PLAN

— 1/2 MILE

H-127

15a



ASSEMBLY DISTRICT 131

BOARD PLAN

— 1/2 MILE

H-131

16a



ASSEMBLY DISTRICT 134
BOARD PLAN
1/2 mile

H-134

17a



ASSEMBLY DISTRICT 138

BOARD PLAN

1/2 mile

H-138

18a



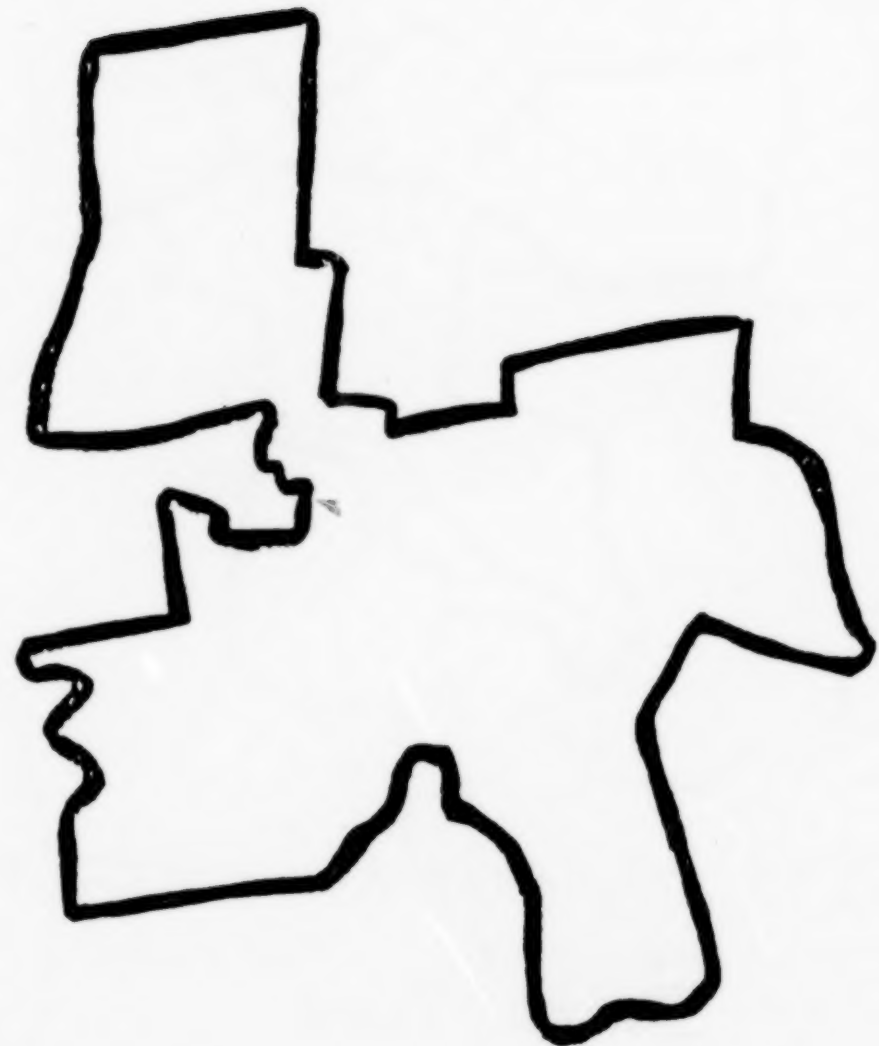
ASSEMBLY DISTRICT 140

BOARD PLAN

— 1/2 MILE

H-140

19a



4th SENATORIAL DISTRICT

BOARD PLAN

— 5 MILES

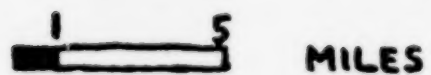
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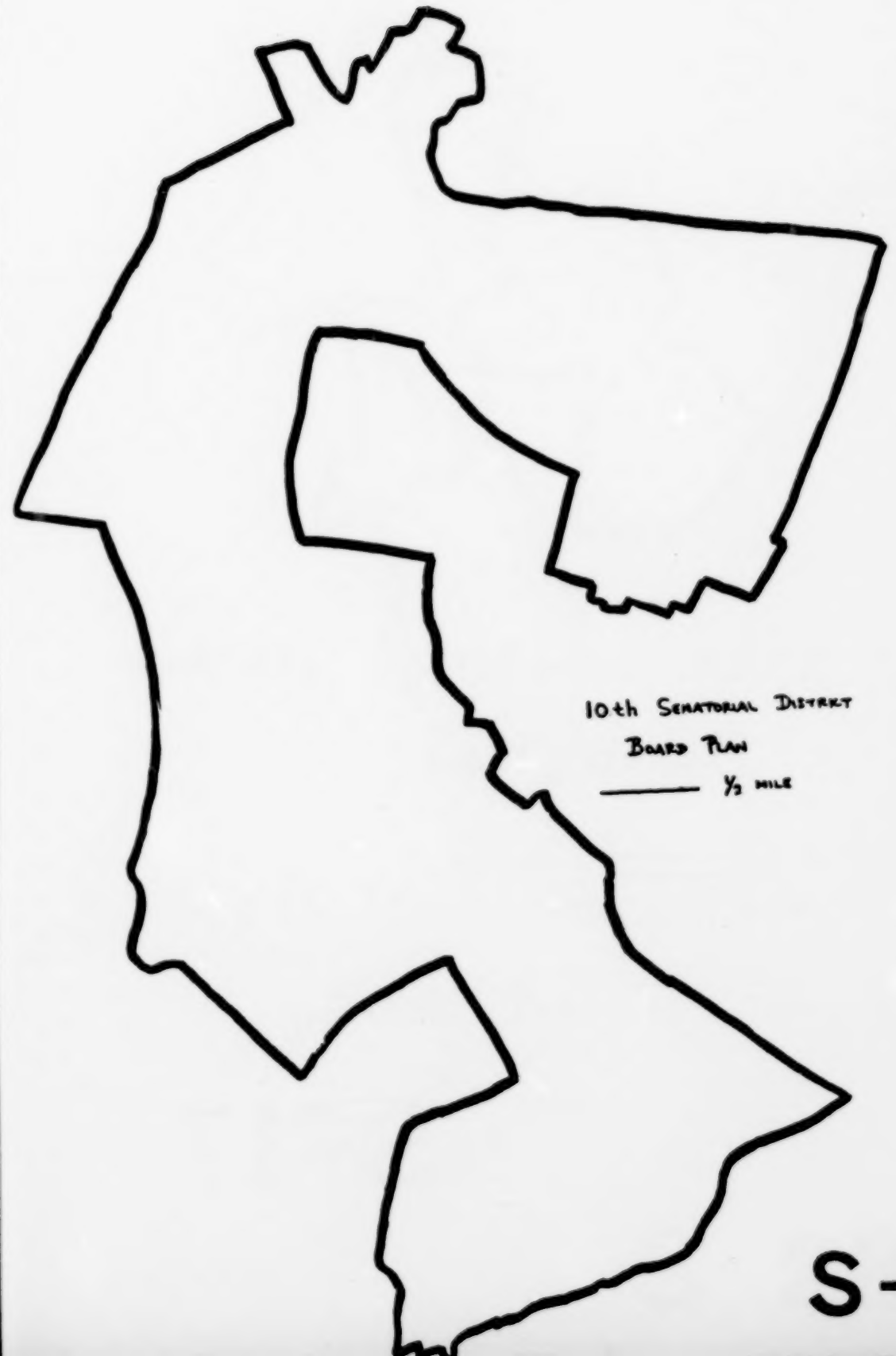
9th SENATORIAL DISTRICT

BOARD PLAN



S-9

21a



10th SENATORIAL DISTRICT
BOARD PLAN

— 1/2 MILE


S-10

22a



17th SENATORIAL DISTRICT

BOARD PLAN

 5 MILES

S-17

23a



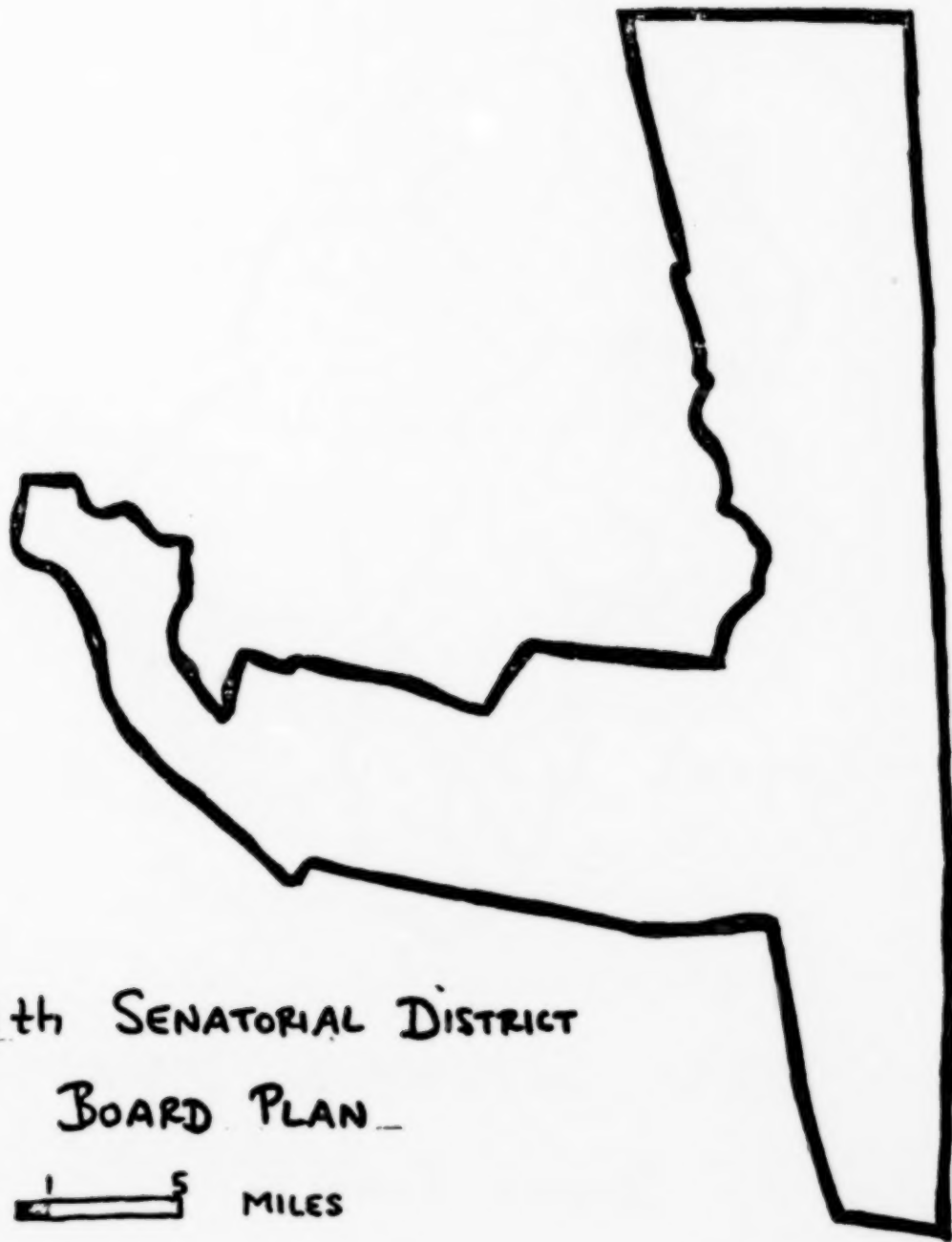
28th SENATORIAL DISTRICT

BOARD PLAN

 5 MILES

S-28

24a



29th SENATORIAL DISTRICT

BOARD PLAN

1 5 MILES

S-29

25a



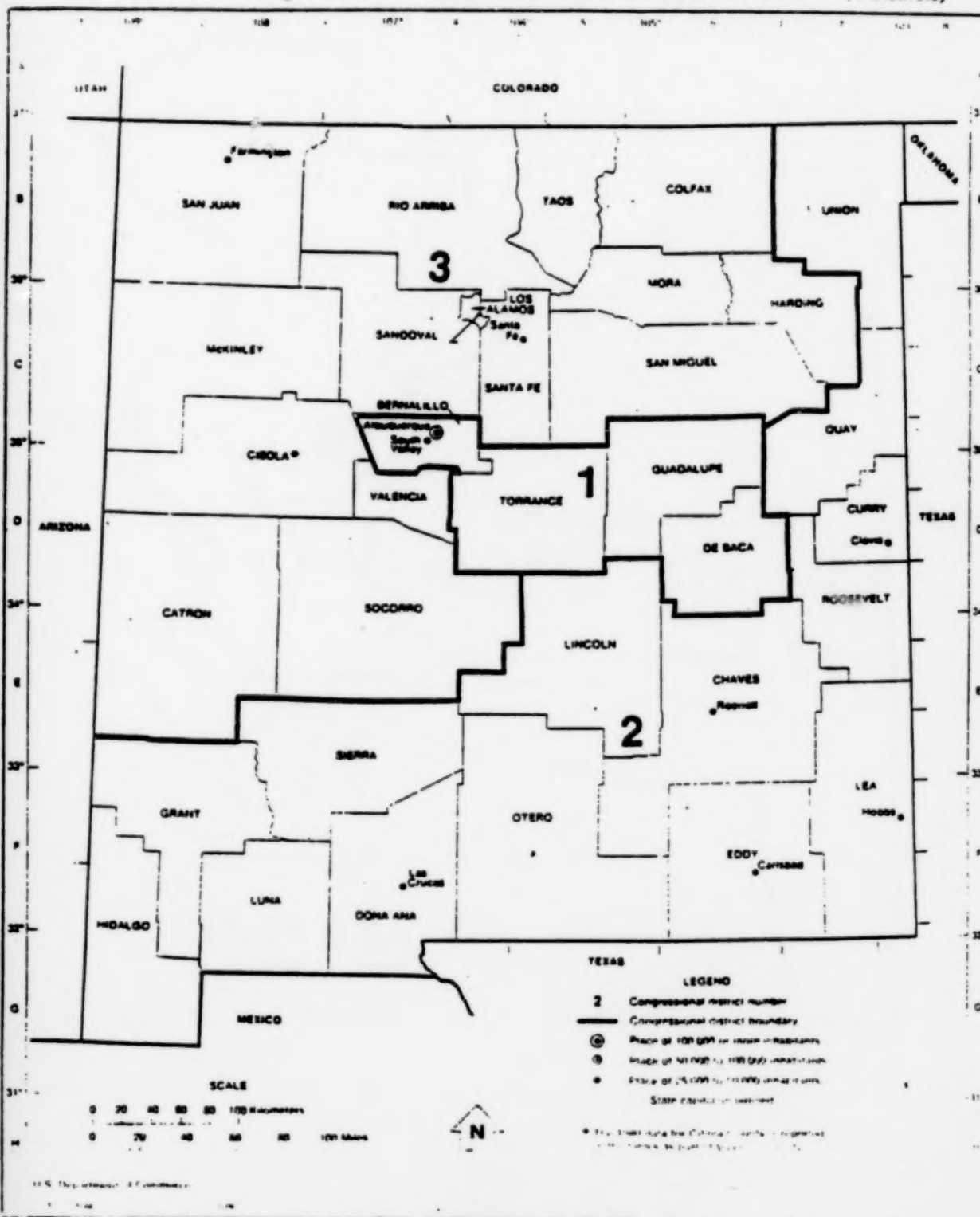
32nd SENATORIAL DISTRICT

BOARD PLAN

1 5 MILES

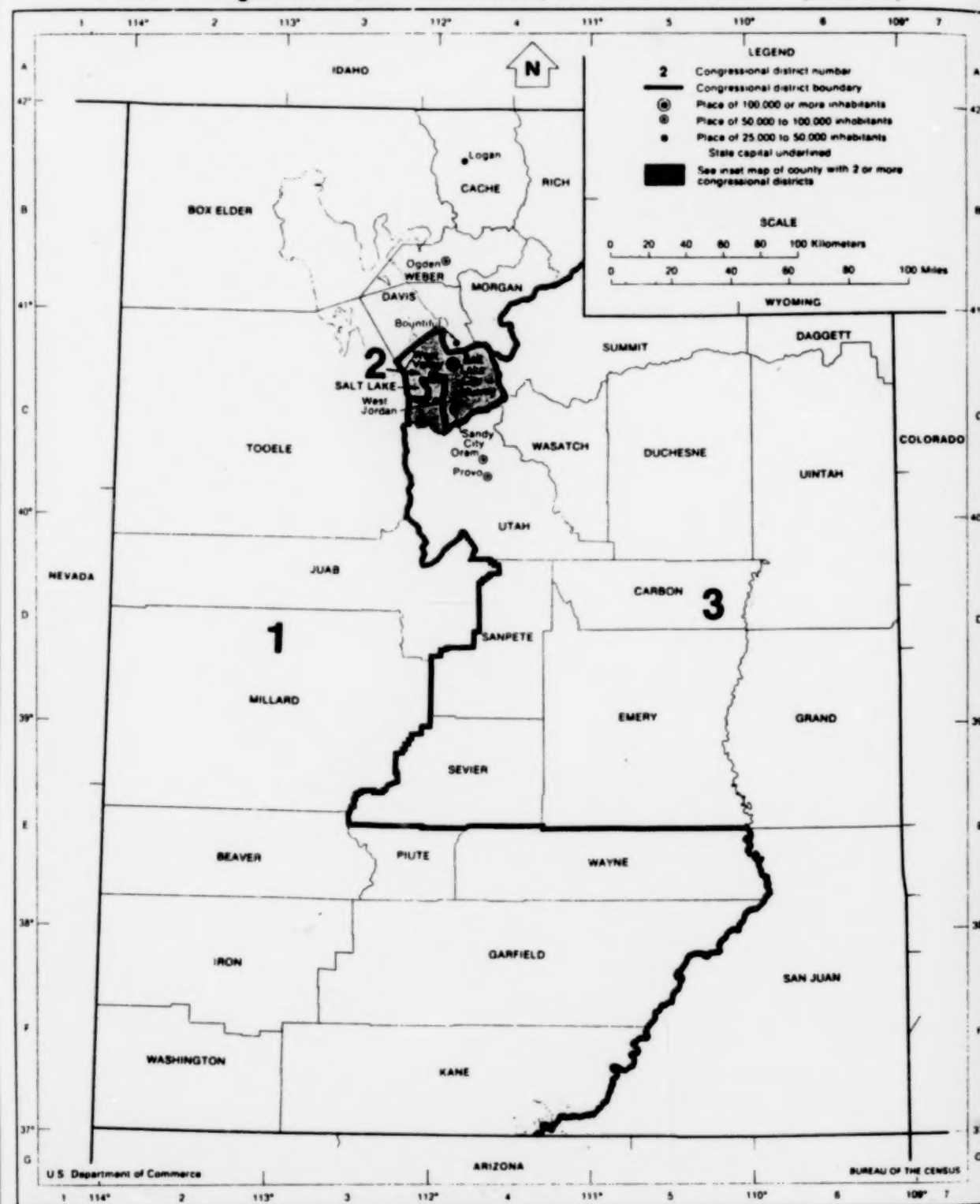
S-32

NEW MEXICO — Congressional Districts, Counties, and Selected Places — (3 Districts)



Appendix B

UTAH — Congressional Districts, Counties, and Selected Places — (3 Districts)



Congressional districts established January 1, 1982; all other boundaries are as of January 1, 1980.

Appendix C

(10)
No. 84-1244

Office-Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

October Term, 1984

SUSAN J. DAVIS, et al.,
Appellants,

VS.

IRWIN C. BANDEMER, et al.,
Appellees.

**Appeal From the United States District Court
For The Southern District Of Indiana**

BRIEF AMICUS CURIAE OF ASSEMBLY OF THE STATE OF CALIFORNIA IN SUPPORT OF APPELLANTS

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No. 84-1244

In the Supreme Court

OF THE

United States

October Term, 1984

SUSAN J. DAVIS, et al.,
Appellants,

VS.

IRWIN C. BANDEMER, et al.,
*Appellees.*Appeal From the United States District Court
For The Southern District Of Indiana**BRIEF AMICUS CURIAE OF
ASSEMBLY OF THE STATE OF CALIFORNIA
IN SUPPORT OF APPELLANTS****INTEREST OF AMICUS**

The California Assembly files this brief for three reasons. First, although its own reapportionment for this decade is the product of a bipartisan compromise and will not be affected by the law of partisan gerrymandering, the Assembly knows that such claims can only bring disruptive litigation which distracts legislators from their duties and undermines the legitimacy of elected representatives. Second, any claim of partisan gerrymandering naturally results in disputes about the intent of legislators and, as the case at bar has shown, leads federal courts to preside over intrusive inquiries into motives and actions of legislators, inquiries that would be unthinkable in any other context. Finally, elevating partisan interests to constitutional status may undermine the

states' ability to protect and promote the interests of racial and ethnic minorities.¹

SUMMARY OF ARGUMENT

The Court need not decide here whether partisan gerrymandering may ever be justiciable. It need only decide whether such a claim may be maintained on behalf of one of the two dominant parties in American political life. This Court has consistently refused to entertain claims of partisan gerrymandering. *WMCA, Inc. v. Lomenzo*, 238 F.Supp. 916 (S.D.N.Y.), *aff'd*, 382 U.S. 4 (1965) (*per curiam*); *Jiminez v. Hidalgo County Water Improvement District No. 2*, 68 F.R.D. 668 (S.D. Tex. 1975), *aff'd mem.*, 424 U.S. 950 (1976). See also *Gaffney v. Cummings*, 412 U.S. 735, 752-54 (1973). And it has never suggested that major political parties are "discrete and insular" minorities, *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), and entitled to special protection.

Partisan gerrymandering claims rest on political assumptions that are not only alien to this Court's jurisprudence, but also inconsistent with the nature of our representative democracy.

Creating a constitutional claim of partisan gerrymandering would inevitably set the interests of political parties against the equitable, statutory and constitutional rights of racial minorities. See, e.g., *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

Finally, the perceived harm of partisan gerrymandering can be avoided by strict application of well-established mechanisms, including judicial review of racial exclusion and one person one vote claims, direct initiative and referendum in many states, state

¹ The California Assembly has intervened, for much the same reasons, in a partisan gerrymandering case involving the California Congressional apportionment. See, *Badham v. Eu*, 721 F.2d 1170 (9th Cir. 1983) and *Badham v. Eu*, 53 U.S.L.W. 3687 (No. 84-1226) (certiorari to the Ninth Circuit on an unreported related holding denied on March 25, 1985).

constitutional and statutory reapportionment rules, and the Voting Rights Act. Moreover, a modest expansion of traditional doctrines, such as a *per se* ban on multi-member districts, could serve the same goals with far less intrusion into the heart of state representative government.

ARGUMENT

I

JUDICIAL PROTECTION OF MAJOR POLITICAL PARTIES IN THE DISTRICTING PROCESS IS NOT SUPPORTED BY THIS COURT'S JURISPRUDENCE

At the outset it is important to note what is *not* at issue here. This is not a racial gerrymandering case.² And it does not necessarily present the issue whether "partisan gerrymandering" in the abstract is or is not justiciable. It presents the limited issue of whether one of the two overwhelmingly dominant political parties in Indiana and the nation can present a cognizable claim of partisan gerrymandering. For reasons that go to the heart of representative democracy we believe that partisan gerrymandering is never justiciable, but the Court need not reach so large an issue. It is enough to say that the party that comprises almost half the Indiana Senate and controls the United States House of Representatives has not been so excluded from the political process as to require intervention by this Court. Just as it would be enough to say that the party that controls the Indiana Senate and comprises close to half of the United States House of Representatives is not so excluded.

² The district court ruled that a racially discriminatory intent had not been proved and therefore rejected the racial gerrymandering claim. App. Jur. St. at A-20. The NAACP plaintiffs also raised a Voting Rights Act claim. The district court's factual findings on racial impact would appear to justify invalidation of the plan or portions of it under § 2 of the Act, which by its terms does not require discriminatory intent. 42 U.S.C. 1973(b). See App. Jur. St. at A-18 to 20, A-30. However, it appears that no Rule 12.4 cross-appeal was filed on either of these claims.

That the appellees have brought their claims this far, we believe, arises from a confusion regarding the nature and extent of judicial review dictated by this Court's voting rights and reapportionment cases. But careful reading of the Court's decisions reveals a clear pattern and deep roots in representative democracy and the Reconstruction Amendments. And if one fact emerges it is that this Court's refusal to entertain partisan gerrymandering claims has been indisputably correct.

The Court's cases may be viewed as falling into either two or three categories.

First are those cases which condemn state action which excludes individuals from political participation. Among these "exclusion" cases are those striking down literacy tests,³ poll taxes,⁴ and durational residency requirements.⁵ In the White Primary Cases the Court found that blacks were effectively deprived of the franchise by their exclusion from all-white primaries which determined the election outcome. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); and *Nixon v. Herndon*, 273 U.S. 536 (1927). Also falling within the "exclusion" cases is *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), striking down a plan that excluded black voters. At stake in each of these cases was the individual's right to vote. The plaintiffs claimed no right to a particular outcome from the process. Their objection was to exclusion from political participation.⁶

³ *Louisiana v. United States*, 380 U.S. 145 (1965).

⁴ *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

⁵ *Dunn v. Blumstein*, 405 U.S. 330 (1972).

⁶ A slightly different form of exclusion was addressed in the ballot access cases. See, e.g., *Anderson v. Celebrezze*, ____ U.S. ____, 103 S.Ct. 1564 (1983); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968). There individuals were permitted to vote, but state laws restricted the ability of candidates to obtain a place on the ballot. When such laws were struck down, as in *Williams* and *Anderson*, it was because of burdens placed upon the "voters' freedom of choice and freedom of association." *Anderson v. Celebrezze*, *supra*, 103 S.Ct. at 1579. In these cases it was the candidate or the party that was

In the second line of cases, spawned by *Baker v. Carr*, 369 U.S. 186 (1962), the Court struck down reapportionment plans which operated with clear and absolute mathematical certainty to make one person's vote worth less than another's.⁷ Once again the individual's fundamental right to vote was at stake.⁸

Then, in *Fortson v. Dorsey*, 379 U.S. 433 (1965), this Court stated in *dicta*:

It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.

379 U.S. at 439.

This *dicta* suggested to some that the Court might recognize a third kind of constitutional vote claim, one not based on exclusion of individuals from the electoral process or mathematical dilution of an individual's vote, but rather on a group interest in a particular electoral outcome. To further support their argument, these advocates point to the Court's willingness to intervene in racial cases. But while these may constitute a third line of cases, they do not support review of partisan claims. And the racial cases

completely excluded from the ballot, rather than the voter excluded from the ballot box, but the result was the same: a voter could not even cast a ballot for the candidate of his or her choice.

⁷ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

⁸ Thus, although the Congressional cases have been based on Article I, § 2 as well as the Fourteenth Amendment, the analysis has been the same except that state legislative plans are not held to the same strict numerical standards required in Congressional cases. *White v. Regester*, 412 U.S. 755, 763 (1973). Compare *Brown v. Thomson*, ____ U.S. ____, 103 S.Ct. 2690 (1983) and *Mahan v. Howell*, 410 U.S. 315, 329 (1973), with *Karcher v. Daggett*, ____ U.S. ____, 103 S.Ct. 2653 (1983).

may properly be seen as a continuation of the line of exclusion cases described above.

In *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Court established standards for resolving racial gerrymandering claims. The Court rejected the argument that "vote cancellation" had occurred simply because the number of black legislators was not proportional to the number of black voters and because black votes were wasted in predominantly white districts.

The voting power of ghetto residents may have been "cancelled out" as the District Court held, but this seems a mere euphemism for political defeat at the polls.

403 U.S. at 153.

Because blacks were permitted to participate fully in the selection of candidates and voting and because there was no evidence that the black community did not receive effective representation of its unique interests, there was no constitutional violation. In short, the Court equated cancellation of voting strength with denial of access to the political process.

In the later cases of *White v. Regester*, 412 U.S. 755 (1973), and *Rogers v. Lodge*, 458 U.S. 613 (1982), the Court applied the *Whitcomb* standards to affirm findings of vote cancellation. In *White*, the Court affirmed a district court decision that cancellation had been achieved through the use of multi-member districts in two Texas counties. There the use of a multi-member district in one county "effectively excluded [the black community] from participation in the Democratic primary selection process" (412 U.S. at 767) and the use of a multi-member district in another county "excluded Mexican-Americans from effective participation in political life". *Id.* at 769. To support its conclusion that these two groups had been excluded from the political process, the district court pointed to the state's history of discrimination against these groups (specifically including discrimination as to voting rights), the almost total absence of members of these groups in the Legislature since Reconstruction, the use of race-oriented campaign tactics and representatives' systematic disregard for the groups' interests. *Id.* at 766-67. In *Rogers*, the proof was quite similar to that in *White*. There was a history of racial

discrimination in the county (specifically including discrimination in voting rights); there was bloc voting on racial lines; no blacks had ever been elected; and elected officials had been unresponsive and insensitive to the needs of the black community. 458 U.S. at 623. The court held that the county's at-large election scheme effected a total exclusion of blacks from the political process.

These cases may reasonably be viewed as modern exclusion cases or as a new line of cases,⁹ for it is not always clear whether the constitutional condemnation in these cases is tied to the fundamental nature of the right to vote or to protection of a suspect class. This ambiguity is most evident in the separate opinions in *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980).

The *Bolden* plurality and Justices Brennan and White all seemed to undertake the traditional analysis governing race discrimination cases. The plurality held that the requisite discriminatory intent was not proved and the dissenters found it present. *Compare* 448 U.S. at 65, 72-74 (plurality) with 446 U.S. at 94 (Brennan, J.) and 446 U.S. at 103 (White, J.). Justice Marshall, also dissenting, likewise found that the evidence established intent to discriminate. 446 U.S. at 137-39. But Justice Marshall further suggested that no showing of intent was necessary because under *Gomillion* and its progeny he would characterize these as fundamental interest cases. 446 U.S. at 104, 118-19. Thus he allowed for the theoretical possibility of cognizable claims by "electoral minorities" as well as protected racial groups. 446 U.S. at 111-12 and n.7. Justice Stevens also read the *Gomillion* line of cases as deriving their power from the effect on the right to vote rather than on the suspect class. 446 U.S. at 86.

⁹ "*Regester* is a kind of present-day version of the 'white primary' cases. Multimember districts, it would seem, violate the Equal Protection Clause, not because they overrepresent or underrepresent pure and simple, but because they do that in a context where all stages of the electoral process have been effectively closed to identifiable classes of citizens, making the political establishment 'insufficiently responsive' to [minority] interests." G. Casper, "Apportionment and the Right to Vote: Standards of Judicial Scrutiny", 1973 *Supreme Court Review* at 28.

But whereas Justice Stevens' approach was used by the district court to legitimize a partisan gerrymander complaint by a major political party, neither Justice Marshall's analysis nor that of the rest of the Court supports this result.¹⁰ This is so because racial and ethnic minorities are so clearly different from partisan groups. The combination of challenged voting mechanisms and embedded patterns of racism can result in the exclusion of racial minorities from political participation and demonstrate intentional discrimination as well. To the extent racial gerrymandering cases are fundamental right cases, it is because, as in the first line of cases discussed above, the individuals in the group are excluded from political participation altogether. On the other hand, to the extent the problem is viewed as class-based discrimination, the cases are manageable only because racial and ethnic groups are fixed and easily identified and patterns of discrimination over lengthy periods of time make evaluations of discriminatory impact feasible.¹¹

¹⁰ Additionally, whereas Justice Marshall's approach would strengthen protections against racial gerrymandering, Justice Stevens' approach, by equating racial and partisan gerrymandering claims, is likely to reduce vigilance against race discrimination. For the inevitable presence of political considerations in the apportionment process leads Justice Stevens to conclude that the process "must tolerate some attempts to advantage or disadvantage particular segments of the voting populace." *Mobile v. Bolden*, *supra*, 466 U.S. at 91 (Stevens, J., concurring).

¹¹ The "heightened judicial solicitude" in race cases is prompted by the fact that

prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities

....
United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

It is questionable whether any political party in this country could be described as discrete and insular. The two major parties surely cannot, and least of all in the election and apportionment context. This is apparent from the innumerable definitions of the protected class that could be developed in partisan cases. Here, the district court effectively

It is not just that racial and ethnic minorities have been victims of the worst social, political and physical violence this nation has ever inflicted on its fellow citizens, but that the Fourteenth and Fifteenth Amendments so strongly prohibit distinctions on racial grounds. These factors coalesce to prompt judicial review and to allow for manageable standards to guide that review.

For purposes of the instant case, we need not choose between the constitutional analyses. It is enough to say that the racial cases, driven by the suspect class component of the Fourteenth Amendment, informed by the power of the Fifteenth Amendment, and regulated by manageable standards, are in a class by themselves. It is enough to recognize the obvious: that none of these cases would even have arisen had the class been Republicans or Democrats. *WMCA, Inc. v. Lomenzo*, 238 F.Supp. 916 (S.D.N.Y.), *aff'd*, 382 U.S. 4 (1965) (*per curiam*); *Jiminez v. Hidalgo County Water Improvement Dist. No. 2*, 68 F.R.D. 668 (S.D. Tex. 1975), *aff'd, mem.*, 424 U.S. 950 (1976).

defined the protected class as those who voted for Democratic candidates in the 1982 election. App. Jur. St. at A-12 to 13, A-24. The alleged discriminatory effect was thus used in bootstrap fashion to identify the protected class. By so doing, the court completely ignored the non-voting population—registered voters who for whatever reason (including silent dissent) abstained from casting a ballot, and the thousands of people who though ineligible to vote are counted in the apportionment of representatives and the formation of districts. Moreover, even judged on its own terms, the group identified by the district court—those who aligned themselves with the Democratic Party—is ever-changing. If this is the standard, then it "would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting); *Whitcomb v. Chavis*, *supra*, 403 U.S. at 156-57. See generally Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) at 151-53.

II

JUDICIAL PROTECTION OF PARTISAN INTERESTS RUNS COUNTER TO OUR REPRESENTATIVE FORM OF GOVERNMENT

We have briefed before¹² and others have fully briefed the extent to which entry into the partisan gerrymandering field would suffer from such a lack of manageable standards as to make the entire subject nonjusticiable. But it is not just the absence of judicially manageable standards which should prompt the Court to stand aside. Intervention would skew the political process in ways which cannot be fully anticipated, but which would severely damage representative democracy as we know it and for little constitutional or social gain.

A. Court Intervention to Control and Oversee Partisan Gerrymandering Would Be Inconsistent With the Structure of this Democracy.

It would be a mistake to view the district court opinion and the approach suggested by proponents of judicial review as somehow objective or neutral. In this area there is no neutrality. Every districting system is premised upon a theory of representation and a set of political values. Alfred De Grazia, in his treatise on the history of representation in the United States, described this phenomenon:

Representation under any system is biased. It favors or extracts some characteristics of the population over other characteristics. . . . Consequently, when one notices a new movement away from a traditional mode of representation into a new mode of representation, he need not think for a moment that the new direction is towards "science," "neutrality," or "abstract justice against personal justice." For it must have its moral premises, no matter how well-concealed they may be.

¹² Brief Amicus Curiae of Assembly of the State of California Prior to Consideration of Jurisdiction at 8-18.

De Grazia, *Public and Republic: Political Representation in America* (1951) at 184-85.¹³

Our system of representative government, established in the Constitution and developed in the succeeding two centuries, is deeply rooted in principles of majority rule, individualism and direct democracy. The approach to partisan gerrymandering that has made its way to this Court is also grounded in political values. When the political assumptions underlying the current complaints are compared with the values embedded in our political tradition, however, fundamental inconsistencies quickly become apparent.

1. A "Built-In Bias Toward the Majority" Is Characteristic of Our System

The district court's expedition into the political workings and motives of the Indiana Legislature was prompted by its conclusion that the apportionment plan had "a built-in bias favoring the majority party." App. Jur. St. at A-13. The district court assumed that this bias was improper or was, at least, a critical signal of impropriety. *Id.* But a bias toward the majority is characteristic of our system. The "first principle" of a republic is "that the *lex majoris partis* is the fundamental law of every society of individuals of equal rights." *Democracy*, by Thomas Jefferson, Letter to Baron von Humboldt, 1817, p. 53, quoted in De Grazia, *supra*, at 107.

For the most part, our representative structure presumes that within an essentially majoritarian system coalitions and compromise will permit the assertion and recognition of minority interests. Consequently no special mechanisms are created to assure

¹³ Proponents of judicial control over partisan gerrymandering will often deny that their approach would lead to a new mode of representation. They may deny, as did the court below, that theirs is a call for proportional representation and state that all they seek is an "effective" or "meaningful" vote. App. Jur. St. at A-24 to A-25. Significantly, however, the political scientists who support this so-called reform movement concede that what is proposed is proportional representation or a variation thereon. See, e.g., Lijphart, "Comparative Perspectives" in Grofman, et al. (ed.) *Representation and Redistricting Issues* (1982) at 155; Pennock, *Democratic Political Theory* (1979) at 358.

minority participation in the process of legislative enactment.¹⁴ Instead, laws that transgress rights enshrined in the Constitution are invalidated *after* enactment. This system of non-interference breaks down only when a particular minority "is barred from the pluralist's bazaar, and thus keeps finding itself on the wrong end of the legislature's classifications, for reasons that in some sense are discreditable." Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) at 152.

Largely through the efforts of Alexander Hamilton, James Madison and John Jay, the Constitution, as adopted, was in some respects anti-majoritarian. See Federalist No. 10. But this did not reflect a preference for empowering political minorities. To the contrary it reflected hostility toward interest groups generally and a desire to neutralize, divide and control them. *Id.* See also Pitkin, *The Concept of Representation* (1967) (hereinafter "Pitkin") at 190-95. Within the limited suffrage of the time, Madison endorsed "the fundamental principle of free government"—majority rule. Federalist No. 58. And to the extent an anti-majoritarian sentiment prevailed in 1787, it has been overtaken in the intervening centuries by the steady advance of direct democracy.¹⁵

Thus, universal suffrage and an 18-year-old voting age have become the norm. Const. Amends. XV, XIX, XXIII, XXIV,

¹⁴ Such mechanisms, including, for example, proportional representation, would be likely to undermine majority rule and arguably "nullify" democracy. Adler, "A Disputation on the Future of Democracy," *The Great Ideas Today: 1978* (Encyclopedia Britannica) at 19. "To be in favor of universal suffrage (which makes the ruling class coextensive with the population), while at the same time wishing somehow to undercut the rule of the majority, is as self-contradictory as being for and against democracy at the same time." *Id.* See also *id.* at 61.

¹⁵ Although the Republic was established in the Eighteenth Century, the advent of democracy in the sense of majority rule really began in the Nineteenth with "the gradual amendment of republican constitutions by extensions of the suffrage and by correction of various forms of oligarchical injustice." Adler, "A Disputation on the Future of Democracy," *supra*, at 9.

XXVI.¹⁶ Caucus nominations have been replaced by direct primaries. And the initiative and referendum have been adopted in many states, permitting the majority to exercise its will directly. All of these advances favor the majority.

Winner-take-all single-member geographical districts also usually produce a strong majoritarian bias.¹⁷ Yet such districts are required by law for congressional and many state legislative elections nonetheless. See 2 U.S.C. § 2c; Cal. Const. Art. 21; Joint App. at JA-71. Such districts create closer ties between representative and constituent. Additionally a strong majority encourages stability and enhances the legislature's decision-making capabilities.¹⁸

In geographical districts it is impossible to give all groups representation. Some minorities will inevitably be submerged.¹⁹ In that sense, the traditional election system is structurally incapable of providing each elector an "equally meaningful vote." "The Constitutional Imperative of Proportional Representation,"

¹⁶ To the extent that women, minorities, the poor and younger people tend to vote with one party or another, each of these provisions creates a "built-in bias."

¹⁷ See "The Constitutional Imperative of Proportional Representation," 94 Yale L.J. 163, 164 n.4, 172; Grofman, "For Single Member Districts Random Is Not Equal," in *Representation and Redistricting Issues*, *supra*, at 55; De Grazia, *supra*, at 187.

¹⁸ Proportional representation eliminates the bias, but at a cost. It encourages divisiveness and fosters antagonism. See De Grazia, *supra*, at 203; Pitkin at 64. It tends to make the legislature a forum for debate rather than for decision-making. Pitkin, *supra*, at 63. It has been charged that proportional representation "makes everyone potent; then it makes everyone impotent; and finally, it makes one man omnipotent." De Grazia, *supra*, at 201.

¹⁹ *Wendler v. Stone*, 350 F.Supp. 838, 840 (S.D. Fla. 1972); "The Constitutional Imperative of Proportional Representation," *supra*, at 172-73. See also Dixon, "Fair Criteria and Procedures for Establishing Legislative Districts," in *Representation and Redistricting Issues*, *supra*, at 7-8, 16.

supra, at 164.²⁰ But this "majoritarian bias" is not something to be condemned; it is an inevitable feature of our system.

2. The Individual, Not the Political Party, Is the Relevant Actor in Our Election System

Even a brief review of the decision below demonstrates the district court's emphasis on the interests of political groups, specifically the Democratic and Republican parties. See, e.g., App. Jur. St. at A-6, A-17 (interests of the majority and minority party in controlling the General Assembly); *id.* at A-11 (assumption that local elections are determined by the ratio of the party vote in national and statewide elections); *id.* at A-11, A-25 (party of the candidates); *id.* at A-25 (concern with group's political access). This fixation on the political party for defining protected voting activity is not only contrary to this Court's prior decisions, it is also contrary to basic assumptions underlying the American system of representation.²¹

For over two centuries prominent themes of American politics have been the individual as political actor and the direct relationship between the people and their representatives. The Constitutional mandate of direct election for the House of Representatives under a system of apportionment by population was, from the outset, understood even by Madison, who was no advocate of populism, "to refer to the *personal rights* of the people, with

²⁰ The Note's author, like many other commentators, suggests that an equally meaningful vote can be achieved only through proportional representation. *Id.* at 164, n.3. See also note 13, *supra*. But then one is proposing a restructuring of our entire system. See Baker, "Threading the Political Thicket," in *Representation and Redistricting Issues*, *supra*, at 31.

²¹ As the plurality opinion in *Mobile v. Bolden* points out:

It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.

Mobile v. Bolden, *supra*, 446 U.S. at 78.

which it has a natural and universal connection." Federalist No. 54 (emphasis added).²²

Jefferson's definition of a republic highlights individual direct action:

Were I to assign to this term a precise and definite idea, I would say purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority.

Democracy by Thomas Jefferson, Letter to J. Taylor, 1816, pp. 61-62, quoted in De Grazia, *supra*, at 105.

From Paris in 1787, Jefferson congratulated Madison on the substitution in the Constitution of voting by persons instead of by states. *The Portable Thomas Jefferson* (ed. Merrill D. Peterson), Letter to J. Madison, 1787, p. 429.

Fundamentally individualist concepts of the social compact and natural rights guided the political theory of the direct democrats and are embodied in the Declaration of Independence, the Preamble to the Constitution and the Bill of Rights. Jefferson was truculently insistent on that individualism. In 1784 he wrote to Francis Hopkinson,

I am not a Federalist, because I never submitted the whole system of my opinions to the creed of any party of men whatever in religion, in philosophy, in politics, or in anything else where I was capable of thinking for myself. Such an addiction is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all.

The Portable Thomas Jefferson, *supra*, Letter to F. Hopkinson, 1789, p. 435.

²² The term proportional representation, though used at the time of the Constitutional Convention, referred only to representation by population rather than by states. De Grazia, *supra*, at 108. See *The Portable Thomas Jefferson* (ed. Merrill D. Peterson), Letter to J. Madison, 1787, p. 429; Federalist No. 39.

Our voting system is premised upon the concept of the individual as the relevant political actor.²³ Yet the district court completely lost sight of the individual and his or her direct relation to government. The court placed the party in between.

3. As a General Rule Election Results Cannot Be Predetermined and Candidates Are Not Fungible

The district court assumed that even in the absence of bloc voting, election results can be predetermined simply by how the lines are drawn. App. Jur. St. at A-13, A-24. The court thus implicitly assumed that, as a rule, voters have made their decisions prior to the selection of candidates, prior to campaigns and without regard to the issues presented and conditions existing at the time of the election. The court treated candidates as though they were fungible within the limits of their party affiliation. See, e.g., App. Jur. St. at A-11, A-25 (candidate's party); A-11 (assumption that local elections determined by national and statewide partisan trends). See also Motion to Affirm at 5 (comparison of district election results to "anonymous" statewide candidates). Our political system and constitutional jurisprudence are to the contrary.

Except in the face of a long history of strict racial bloc voting, *Rogers v. Lodge*, 458 U.S. 613, 623 (1982), the courts have never been willing to accept the idea that election results are predetermined.²⁴ In *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), for

²³ David R. Mayhew, in his book *Congress: The Electoral Connection* (1974) discusses the role of parties in elections. He emphasizes that congressional candidates cannot rely on party affiliation to get elected. "[A] congressman can—indeed must—build a power base that is substantially independent of party." *Id.* at 26. And he concludes that "no theoretical treatment of the United States Congress that posits parties as analytic units will go very far." *Id.* at 27.

²⁴ See *Wells v. Rockefeller*, 311 F.Supp. 48, 51 (S.D.N.Y.) *aff'd mem.*, 398 U.S. 901 (1970) ("Recent election figures... are only indicative of the voters' reaction to a particular candidate."); *Kilgarlin v. Martin*, 252 F.Supp. 404, 433 (S.D. Tex. 1966), *rev'd on other grounds sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967) (*per curiam*) ("The only demonstrable way available to fathom the political inclinations of a

example, the Court tacitly rejected the argument that it should uphold limits on political expenditures because expenditures have such power to influence the vote.

Additionally, predetermination implies that the campaign organization, the characteristics of the candidates, their expenditures and the issues debated before the voters make little or no difference. Except in uncontested elections these assumptions go too far.²⁵ The very facts that Indiana is a swing state and that there are surprise upsets belie the claim of systematic predetermination. Moreover, this assumption discounts the range of policies and positions among candidates from a single party. One Republican or Democratic candidate is not the same as another, certainly not in California: "... political parties are weak in California. There is no strong party discipline that determines how members of the Legislature will vote on any issue. Party positions are rarely taken on bills, and legislators vote more in accordance with the views of their constituents and their own consciences than with the views of party leaders." Quinn and Salzman, *California Public Administration: Text and Readings on Decision-making in State Government* (1978) at 19.

4. The Presumption in Our System Is That Representatives Act for Their Entire Constituency, Not Just for Those Who Voted for Them

The district court's statewide analysis of voting results ignores the significance of the district constituency. And the district court's emphasis on the candidate's party affiliation implies that the only important thing a representative does is to vote on

certain area at any given time is at the ballot box on a given election day.").

²⁵ Hence, Mayhew notes that "vote variation over which congressmen have reason to think they can exercise some control (i.e. the primary vote and the local component of the November vote) is substantial. ... [I]n general elections... district vote fluctuations beyond or in opposition to national trends can be quite striking." *Congress: The Electoral Connection, supra*, at 34. See also *id.* at 39 (election outcomes are influenced by "money, the ability to make persuasive endorsements, organizational skills, and so on").

partisan issues. In fact, however, many of the representative's activities and responsibilities relate to non-partisan concerns of individual constituents or to the interests of the constituency as a geographical or economic unit.²⁶ Thus, the representative provides constituent services to everyone in the district, is expected to bring governmental contracts, industry and other economic benefits into the district and is expected to represent the district's general welfare.²⁷ When Abraham Lincoln ran for reelection to the Illinois Assembly in 1836, his platform promised:

If elected, I shall consider the whole people of Sangamon my constituents, as well those that oppose as those that support me.

Quoted in De Grazia, supra, at 127.

B. Review of Alleged Partisan Gerrymanders Will Draw the Courts Deeply Into Internal Legislative Processes in the Several States

If courts undertake review of partisan gerrymandering, they will inevitably become enmeshed in reviewing and judging the internal workings and subjective motivations of the state legislative bodies

²⁶ The proportionalists reject this concept and find geographical constituencies an impediment to fair representation. *See De Grazia, supra, at 195*; "The Constitutional Imperative of Proportional Representation," *supra, at 165* (proportional representation requires large multi-member districts).

By contrast, this Court has closely scrutinized multi-member districts. Indeed, the time may have come to hold that multi-member districts are unconstitutional *per se*. *See Whitcomb v. Chavis*, 403 U.S. 124, 145-47 (1971), in which the Court considered new mathematical evidence that multi-member districts may violate one person one vote requirements, but found that "[t]he real-life impact of multi-member districts on individuals has not been sufficiently demonstrated, at least on this record, to depart from prior cases." *Id.* at 146. *And see Banzhaf, "Multi-member Electoral Districts—Do They Violate the 'One Man, One Vote' Principle," 75 Yale L.J. 1309 (1966).*

²⁷ *See Jewell, "The Consequences of Single and Multimember Districting" in Representation and Redistricting Issues, supra, at 132-34.*

that, in the first instance, are responsible for legislative districting. Const. Art. I, § 4.²⁸ This fact, standing alone, sets this case apart from all previous cases to which the Court has extended review²⁹ and mandates judicial restraint in order to preserve legislative independence and promote principles of comity.

As Professor Deutsch put it:

[Partisan gerrymandering review would] require the Court to canvass the actual workings of the floor leadership in the legislative branches, [and] the mechanisms of party control Even assuming that the evidence was available and would be forthcoming, is it likely that our society could accept, as a steady diet, the spectacle of the judiciary solemnly ruling on the accuracy of a political boss's testimony concerning the sources of his power over voters and the degree of control that he exercised over elected officials?

Deutsch, "Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science," 20 *Stan. L. Rev.* 169, 247 (1968).

In the past this Court has shown great sensitivity to these concerns.³⁰ In some "extraordinary instances" public officials may

²⁸ That is precisely what happened here. The court took testimony from individual legislators. App. Jur. St. at A-8 to A-9. It reviewed and condemned the parliamentary procedures by which the reapportionment bill was introduced, the legislative committee appointments, and the adequacy of legislative hearings, review and deliberation. *Id.* at A-7 to A-9. The court did all of this with little reference to what, if any, "normal" procedures are employed by the Indiana legislature. *See Joint App. at JA-22.* Of course, had the court taken this further step to justify its condemnation, the intrusion into internal legislative processes would have been that much worse.

²⁹ In race cases discriminatory intent must be proved, but this requirement rarely, if ever, requires inquiry into the minds of state legislators or the parliamentary processes of state legislatures. *See, e.g.,* circumstantial evidence of intent discussed throughout *Rogers v. Lodge, supra.*

³⁰ *See, e.g., Garcia v. United States, — U.S. —, 105 S.Ct. 479, 483 (1984); Village of Arlington Heights v. Metropolitan Housing*

be called to the stand to testify concerning the purpose of an official action, but "even then such testimony frequently will be barred by privilege." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977). Even if such individual testimony were allowed, its validity to prove the intent of the legislative body is doubtful. See *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *United States v. O'Brien*, *supra*, 391 U.S. at 385-86. And courts have been understandably reluctant to accept the other alternative—review of the parliamentary maneuverings that led to legislative enactment.³¹

The reluctance to subject legislators to judicial review of acts connected to their legislative duties has deep roots in the parliamentary struggles of the sixteenth and seventeenth centuries. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). Protection from the intrusion of litigation was thought so important by the framers of our Constitution that they incorporated the common law privilege of legislators in the Speech and Debate Clause, Art. I, § 6.³² All but seven states have similar protections in their

Development Corp., 429 U.S. 252, 267-68 (1977); *United States v. O'Brien*, 391 U.S. 367, 383-85 (1968); *Fletcher v. Peck*, 6 Cranch 87, 130-31, 3 L.Ed. 162 (1809).

³¹ If an Act of Congress is properly signed, enrolled, and deposited as the Constitution requires, the federal courts refuse to make an evidentiary inquiry into the actual facts of its passage, no matter what the seeming strength of the evidence that the Act was not properly passed—for example, that the text as passed differed from the text as enrolled, *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670-73 (1892), or that a quorum was not actually present, *Lyons v. Woods*, 153 U.S. 649, 662-63 (1894); *United States v. Ballin, Joseph & Co.*, 144 U.S. 1, 3-4 (1892). "Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government." *Marshall Field & Co. v. Clark*, *supra*, 143 U.S. at 673. In California and other states, courts similarly refuse to look behind an enrolled bill to judge the parliamentary process by which it was adopted. See, e.g., *County of Yolo v. Colgan*, 132 Cal. 265, 274-75, 64 P. 403, 407 (1901).

³² If the sort of discovery that occurred in this case were sought against members of Congress, the Speech and Debate Clause would

constitutions. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 406 (1979) (Marshall, J., dissenting).

To be sure, the federal Speech and Debate Clause does not directly protect state legislators from federal process. *Lake Country Estates, Inc. v. Tahoe Planning Agency*, *supra*, 440 U.S. at 404. Nor is there a comparable evidentiary privilege for state legislators in federal criminal proceedings. *United States v. Gillock*, 445 U.S. 360 (1980). But, as Justice Frankfurter said in *Tenney v. Brandhove*, *supra*, in the course of explaining why state legislators are absolutely immune from suit for damages under 42 U.S.C. § 1983:

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial . . . The holding of this Court in *Fletcher v. Peck* . . . that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

Tenney v. Brandhove, *supra*, 341 U.S. at 377.³³

without question make them absolutely immune from it, whether the underlying proceeding was criminal or civil. See, e.g., *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (criminal); *United States v. Brewster*, 408 U.S. 501, 525 (1972) (same); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 508-11 (1975) (civil); *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969).

³³ *Lake Country Estates*, *supra*, 440 U.S. at 405, and *United States v. Gillock*, *supra*, 445 U.S. at 372-73, both reaffirm the continued vitality of *Tenney* in civil suits. And at least two circuits have applied the *Tenney* rule to Section 1983 actions for injunctive relief. *Star Distributors, Ltd. v. Marino*, 613 F.2d 4, 10 (2d Cir. 1980); *Green v. DeCamp*, 612 F.2d 368, 369, 372 (8th Cir. 1980).

C. Judicial Recognition of Partisan Interests Will Endanger Protection of Racial Minorities

Recognition of partisan gerrymandering claims will certainly lead to increased challenges to reapportionment plans. As these cases arise, the potential for serious conflict between racial and partisan interests increases dramatically.

The immediate risk is that partisan and racial interests will be pitted against one another with the courts as referees. Cf. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (Hasidic Jews' complaint against New York apportionment plan designed to enhance representation of nonwhites).

Even districts drawn to implement the Voting Rights Act may be challenged when such implementation alters the partisan balance. Whenever members of a racial group are predominantly aligned with the majority party, line-drawing that advantages the racial minority will also advantage the majority party. Even were this Court to rule that partisan effects are permissible so long as the purpose is to enhance representation for racial minorities, the intractable problem of discerning whether the legislature's motives were racial or partisan will remain. The problem is well illustrated here by the lower court's attempt to decide whether blacks were disadvantaged because they were blacks or because they were Democrats.

Any decision extending constitutional protection to partisan interest will almost inevitably lead to conflict in the legislative forum as well. It is indisputable that no matter where district boundaries are placed, some political interests will be adversely affected. Dixon, "Fair Criteria and Procedures for Establishing Legislative Districts," in *Representation and Redistricting Issues*, *supra*, at 7-8; Backstrom, "Problems of Implementing Redistricting," in *Representation and Redistricting Issues*, *supra*, at 45-46. Currently, legislatures can take affirmative steps to enhance the representation of racial and ethnic minorities without thereby making the resulting apportionment plan vulnerable to court challenges by other political interests. If partisan claims are given constitutional recognition, then future legislatures will have to assess the likelihood of a partisan attack each time they draw a

line that advantages a racial minority. And when the conflict is between the interests of a racial minority blessed with few or no representatives in the decisions-making body and the interests of one of the two major political parties, minority interests may not always prevail.

There is no good reason to create this conflict. No one can seriously argue that the evils of the two types of gerrymandering are the same. Racial gerrymandering reflects entrenched racism. The effect of partisan gerrymandering, on the other hand, is transitory. Even a "successful" partisan gerrymander will have a declining impact over the course of a decade as district demography changes. Party labels mean different things at different times. In this country one can change his politics, but not his race.

CONCLUSION

This Court has a number of powerful and manageable tools to deal with redistricting abuses. The Voting Rights Act and the Fourteenth and Fifteenth Amendment race cases control the worst form of gerrymandering. One person, one vote standards limit partisan discretion.

In addition, state constitutions often establish further restrictions, and the popular initiative and referendum provide direct democratic review of the process.

The most important check on partisan gerrymandering, however, is the ebb and flow of political power between the two major parties at the local, state and federal levels. At some times and in some places the balance of power between the two major parties is even; usually it is not. But it is for the people to shift the balance, not the courts.

The decision of the district court should be reversed.

Dated: May 8, 1985.

Respectfully submitted,

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**ALEXANDER L. STEVAS,
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,
Appellants,
v.

IRWIN C. BANDEMER, *et al.*,
Appellees.

On Appeal From the United States District Court for the
Southern District of Indiana

AMICUS CURIAE BRIEF OF COMMON CAUSE

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause protects individuals against discrimination intended to minimize or dilute their representation in the state legislature solely on the basis of their views of policy, their political philosophy, or their allegiance to a particular party.

2. Whether the District Court findings and the record below support a conclusion that the purpose and "necessary scope and operation" of the Indiana redistricting plan was to discriminate against those of particular political views and allegiances.

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IRWIN C. BANDEMER, *et al.*,
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 On Appeal From the United States District Court for the
 Southern District of Indiana

AMICUS CURIAE BRIEF OF COMMON CAUSE

**INTEREST OF THE AMICUS AND
 SUMMARY OF ARGUMENT**

Common Cause is a non-partisan organization with 250,000 members, a central purpose of which, for fifteen years, has been to further responsible and honest government, accountable in practice as well as theory to the voters who elect it. Because we believe this case involves extraordinary stakes for democratic political institutions, Common Cause seeks leave to file an *amicus curiae* brief urging affirmance of the decision.

The voting right at stake in this case is, quite simply, a right not to be discriminated against on the basis of one's political views and likely voting disposition with the effect, purposely brought about, of significantly diminishing the chances or extent of representation of those views in the state legislature. Such discrimination on political grounds has been held unconstitutional in other areas, such as government employment. Identical voting rights have been protected in the case of racial minorities, and have repeatedly and explicitly been declared to be protected for political groups as well.

There is no unusual difficulty in applying these familiar rules to gerrymandering. A pattern of districting decisions intended and designed to discriminate against voters of different views and loyalties in order to protect or increase the legislative control enjoyed by those doing the redistricting is as obvious and detectable as the design behind any repetitive, purposeful activity. It can be readily distinguishable from other purposes and from the results of coincidence. Its proof is objective and does not depend on evidence of the subjective motivation of legislators, although that, too, is clear in cases of partisan gerrymandering. The remedy in the case of gerrymandering is no different from that by now familiar in reapportionment cases.

Citizens are simply entitled not to be made the victims of legislative schemes intended and designed solely to deny political effect to their views or voting dispositions. The Fourteenth Amendment forbids such discrimination on the basis of political beliefs and allegiances, but it requires nothing more. There is, thus, no right to particular proportions of Democrats, Republicans, independents and others in a district. And there is no model districting, departures from which require justification. Any of a number of purposes and policies can justify any of a variety of districting schemes in a state. There is no right to a certain form of districting.

In short, the doctrines applicable to this area are traditional and well established and their reach is modest, not supplanting broad political judgment. But the protection granted is crucial to dealing with the grave danger to the very legitimacy of our political processes posed by uninhibited partisan manipulation of district lines. Through the careful manipulation of district lines a party enjoying a majority in a state legislature can, for a period of many years, wall off, from the competing views of even a clear and substantial majority of the state's voters, the majority party's control of the legislature's decisions about programs, philosophies and individual issues.

In this case, for example, only a Democratic political tidal wave of "Watergate" proportions might bring the Democratic party into power in the Indiana legislature. In other states the positions of the parties are reversed, but the damage to fundamental democratic values is the same. Clever manipulation, uninhibited by the prospect of any form of judicial challenge, creates one-party government free of the inconvenience of shifting voting majorities. For this Court to refrain from applying traditional concepts to this area would be to leave the survival of vigorous, contested, two-party government in the hands of legislative powers that quite obviously have a vested interest in continuing and worsening, rather than rectifying, the purposeful discrimination against "unfriendly" groups of voters and the destruction of party competition that can be brought about by cleverly gerrymandered redistricting schemes.

ARGUMENT

INTRODUCTION

This Court's decisions have made plain that discrimination against individual citizens on the basis of their views as to issues, their political philosophies, or their allegiance to a particular party is forbidden by the Fourteenth Amendment. *Elrod v. Burns*, 427 U.S. 347 (1976). This case presents the question whether such discrimination is permissible in the context of a legislature drawing district lines for a state's two legislative houses. The central question is therefore one of justiciability, but not because the area is richly infused with partisan political concerns; for this has been true of such related questions as those presented by *Baker v. Carr*, 369 U.S. 186 (1962) and *Elrod v. Burns*, 427 U.S. 347 (1976). And the question of remedy is identical to that repeatedly and successfully addressed in the reapportionment cases. The issues of justiciability here consist of two more specific questions: whether there is a form of harm to individuals cognizable under the Fourteenth Amendment and whether there are manageable, traditional standards for judicial review of claims in this area.

The individual right at stake—not to be subject to purposeful diminution of the impact of one's vote—is by now well established in a series of cases. Moreover, entirely familiar legal precedents and concepts for dealing with discrimination under the Fourteenth Amendment are all that a court needs to handle the obvious and blatant cases of gerrymandering which pose a significant threat to the health of our democratic institutions. There is no more reason to be deterred from dealing with blatant discrimination because other forms of discrimination will escape proof or present ambiguous circumstances in the area of partisan districting than there is reason to refuse to consider any of a number of other

claims of discrimination on similar grounds. And this Court has never declined to deal with a class of claims of discrimination simply because many of them would inevitably fail to meet the heavy burdens imposed on those attacking legislation. Cf. *Perry v. Snidermann*, 408 U.S. 593 (1972); *Elrod v. Burns*, 427 U.S. 347 (1976).

Finally, we are not urging this Court to develop a law of precise districting. Nothing, here, corresponds to the principle of "one person, one vote." Neither precedent nor decent respect for the role of the political branches of state government would suggest that this Court undertake the development of a body of constitutional precedent defining the characteristics of a proper districting scheme. There are too many possible variations in districting plans based on differing judgments of democratic electoral theory and policy. But precedent does dictate, and respect for state legislation does not forbid, applying to districting schemes the same traditional principles that forbid discrimination in other phases of the process of governing.

I. THE EQUAL PROTECTION CLAUSE PROTECTS INDIVIDUALS AGAINST DISCRIMINATION INTENDED TO MINIMIZE OR DILUTE THEIR REPRESENTATION IN THE STATE LEGISLATURE SOLELY ON THE BASIS OF THEIR VIEWS OF POLICY, THEIR POLITICAL PHILOSOPHY, OR THEIR ALLEGIANCE TO A PARTICULAR PARTY.

A purposefully partisan gerrymander plainly violates rights protected by the Fourteenth Amendment, unless traditional constitutional standards cannot be applied in familiar ways to this form of legislation. In other contexts this Court has forbidden discrimination on the basis of political views or party allegiance. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). The rights of racial minorities to be protected against the "dilution" of voting rights have been established in cases dealing with multi-member districts and

gerrymandered districting schemes. The effect on the right to vote in those circumstances is identical to that in the present case. The rule stated in the multi-member cases for some decades has explicitly included protection of political groups against purposeful vote dilution for partisan purposes.

A. Invidious Discrimination on the Basis of Political Beliefs or Allegiance is Forbidden by the Fourteenth Amendment.

A state may not make food stamps more available to those whose policy views, political philosophies, or party allegiances a majority of the legislature favors. *Cf. U.S.D.A. v. Moreno*, 413 U.S. 528 (1973). A state or local agency which can constitutionally fire for no reason at all cannot dismiss employees because of their party or because of a desire to favor those of a different party. *Elrod v. Burns*, 427 U.S. 347 (1976). The Fourteenth Amendment provides protection against invidious discrimination on the basis of views, philosophy, or party allegiance. And even more than equality is at stake. Such discrimination directly and severely threatens fundamental rights under the First Amendment as well as basic requirements for maintaining democratic government. *Elrod v. Burns*, 427 U.S. 347 (1976).

Reason alone would dictate that such discrimination would present even clearer Fourteenth Amendment problems when what was involved was the right to cast a meaningful vote, for this right implicates all others. *Reynolds v. Sims*, 377 U.S. 533 (1964). Where the purpose of a legislative act, such as the drawing of district lines, is to discriminate against members of some group, identified by its beliefs or party allegiance, by designing a system that requires a greater number of votes for the members of that group to achieve a given proportion of legislative seats (*Cf. Hunter v. Erickson*, 393 U.S. 385 (1969)), the members of that group have been deprived of much of their most fundamental right, the right to representation of their views in the elected legislature.

B. The Harms Resulting from Purposeful Reduction of the Impact of One's Vote for Discriminatory Reasons Have Long Been Recognized as Justiciable.

This Court's precedents have established a Fourteenth Amendment right to protection against purposeful vote "dilution." Cases dealing with racial minorities have made clear, for decades, that a purposeful legislative effort to diminish the effect of the votes of a minority group is prohibited by the Constitution, even if the members of the group retain all the formalities of voting rights. Established in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), where blacks were purposely districted out of a city's limits, this rule was then accepted in the context of congressional districting a few years later. *Wright v. Rockefeller*, 376 U.S. 52 (1964).

The very same right not to be subject to invidious discrimination designed "to minimize or cancel out the voting strength of racial or political elements of the voting population" has been discussed and applied in a large number of cases involving multi-member districts. In this context the inclusion of protection against political discrimination has been explicit and repeated. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971); *Chapman v. Meier*, 420 U.S. 1, 17 (1975). *Cf. Gaffney v. Cummings*, 412 U.S. 735, 751 (1973).

The submersion of an individual's vote in a multi-member district is accomplished by adding enough voters of different views or party allegiance to the district until it is clear that the r... enlarged district will vote as the legislative major... would want it to. Since the district now may have a substantially greater population than that of an average single district, the Constitution requires the district to be given more than one representative. But if the representatives are elected

at large they will all represent the views of the purposely "gerrymandered" majority.

Purposeful reduction of the representation of one group's views is the core of the violation in the multi-member district and racial gerrymandering cases. Discrimination on the basis of race, beliefs, or party allegiances is the wrongful action; dilution of the impact of the votes of certain groups of citizens is the harm. There is no underlying notion of a constitutionally correct set of boundaries for a city, a congressional district, or a legislative district. This is even so in the case of a multi-member district. Neither the wrong, invidious discrimination with regard to legislative representation, nor the harm to its victims is established by comparison with a "model" system of single-member districts but rather by showing discriminatory purpose and its intended effects without regard to some "perfect model." *Cf. Branti v. Finkel*, 445 U.S. 507 (1980).

There is, in fact, no meaningful or intelligible way to compare the impact of the votes of a racial minority in a multi-member district with their presumed impact under a "model" scheme that used only single-member districts; for, depending on how the boundaries of the single districts were drawn, the racial minority might have had no more chance of electing representatives in the single-member districts. In the absence of constitutional restrictions, single-member districts could always be gerrymandered to produce the same unfavorable proportions and the same unlikely chances of winning representation as the minority faces when it is submerged in a multi-member district. In each case in which this Court has questioned multi-member districts, the harm has been purposeful reduction in representation for indefensible, invidious reasons, not departure from some constitutionally required districting plan.

C. Discrimination Intended to Dilute the Impact of the Votes of Political, as well as Racial, Groups Has Been Forbidden in the Case of Multi-Member Districts.

The long line of cases dealing with multi-member districts speaks very explicitly, and deliberately, in terms of Fourteenth Amendment protection against legislative measures designed and operating to minimize the voting strength of racial or political elements of the voting population. *See, e.g., Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971). *Cf. Gaffney v. Cummings*, 412 U.S. 735, 751 (1972). This Court has regularly stated that a purposeful discrimination intended to minimize the impact of votes by creating multi-member districts is prohibited when the victims are political groups.

Undoubtedly the same is true of ethnic, religious, economic, and social elements of the population. Italian Americans, Jehovah's Witnesses, farmers, and Freemasons, as well as Republicans and Democrats have a right not to be submerged in multi-member districts for the very purpose of diluting their voting strength. The evidence of purpose would have to be clear and persuasive. It is not enough that a group claims that its representation would be more with a different districting scheme, such as single-member districts. *Chapman v. Meier*, 420 U.S. 1, 17 (1975). But if purposeful discrimination were adequately proved, the case would be made out.

D. There is no Distinction in Purposes or Effects Between Cases Involving Multi-Member Districts and Cases of Gerrymandering.

The harm to an individual voter and the gain to the majority party in a legislature from a legislature's purposefully drawing single districts in such a way as to minimize the impact of the votes of a political group to which the individual belongs is identical to the harm

and the gain that can be accomplished by placing that individual in a multi-member district.

It makes no difference to either the perpetrator or the victims of the discrimination whether the device is the manipulative creation of a multi-member district with carefully designed population ratios or the division of that area into smaller districts with identical, carefully designed population ratios. The process and results are fully interchangeable. Identical consequences can be accomplished with equal ease by simply drawing new districting lines for single-member districts which can readily be designed to have the same proportions as the multi-member district would have. If there were no constitutional protection against gerrymandering *any* prohibited multi-member district could simply be divided into carefully gerrymandered single-member districts without any significant change in the legislature's ability to dilute the votes of a political or racial group.

It therefore makes no sense to continue to recognize, as this Court has for many years, that members of political groups are protected against invidious discrimination in districting when the device used is a multi-member district but not recognize the same rule when the device used is gerrymandered single-member districts. The harm, purposefully diminished voter impact resulting from invidious discrimination, is identical and identically effective in both cases.

Nor does the possibility of extreme abuses depend upon the form the legislature uses. Nothing except the prohibition against purposeful discrimination in representation on the basis of political views or party allegiance prevents the state from using even noncontiguous districts to diminish to a point of marginal importance the votes of anyone identified with the opposition to the party then enjoying majority status in the legislature. In Indiana, were it not for the prohibition of purposeful discrimination against members of a political group, the

Republicans could place Democrats from one corner of the state along with Democrats from a remote opposite corner in the same voting district. In other states, the Democrats could discriminate equally invidiously against the Republicans.

E. Maintaining the General Prohibition of Political Discrimination in Dealing with Redistricting is of Great Practical Importance.

The effects of retreating from the lines this Court has drawn which broadly prohibit discrimination on the basis of political views, philosophy, or party allegiance and which recognize the special importance of this prohibition in the area of voting, including efforts to diminish the impact of the votes of opponents, would be extremely dangerous to our democratic political processes. In all but the most unusual of circumstances, it is possible for a majority party in a legislature to wall off its control of the legislature's decisions so that the competing views of even a clear and substantial majority of the state's voters will not be reflected in legislative decisions. It is not difficult to construct, for example, illustrations where less than one-third of the voters can be given working control of more than sixty percent of the seats in a legislature of five districts.¹ All that is required is a careful manipulation of district lines for a momentary majority in a state legislature to make itself nearly immune from changing views of the voters.

All that stands in the way of this is a traditional constitutional doctrine prohibiting discrimination against a racial or political group, intended solely to diminish the

¹ Consider a state with one hundred voters, 67 of whom were supportive of A party and 33 of B party, which controlled the state legislature. The B group can create three districts in which it wins 11 votes to 9, and two in which the A group wins unanimously with 20 votes.

impact of that group's exercise of its voting rights. In this case, more particularly, the protected group is those who have been selected for discriminatory treatment solely on the basis of their policy views, their political philosophies and their party allegiances.

II. COURTS CAN APPLY FAMILIAR STANDARDS OF DISCRIMINATION IN A STRAIGHTFORWARD WAY TO ASSESS CHALLENGES TO A REDISTRICTING PLAN.

The fears that some have expressed regarding the amenability of districting plans to judicial review under familiar concepts are mistaken. As we have argued, there is no need to develop affirmative notions of what a proper districting plan should include;² traditional Fourteenth Amendment concepts forbid invidious discrimination on the basis of citizens' policy views, political philosophies, or party allegiances. It is also true that the evidence and record necessary to apply these concepts is as readily available and easily construed in this context as in any other.

To establish a violation of the Equal Protection Clause of the Fourteenth Amendment by a partisan gerrymander the plaintiffs must show that, in terms of inherent effects or pattern and also of motivation, important parts of the legislation were designed solely to reduce the legislative representation of those with particular policy views, political philosophies, or party allegiances. In the present case the class or "political elements" (*Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971)) discriminated against consists of likely Democratic voters.

² A number of Common Cause state organizations have actively promoted a model reapportionment plan which includes specific standards. This plan has been urged on policy grounds, as one that would satisfy the Constitution—not as one that is constitutionally required.

A. The Redistricting Legislation Itself, Read in the Context of What was Known About Where Various Political Groups are Located, Must Display the Purpose and Effect of Lessening the Representation of Political Opponents.

The purpose to discriminate must be shown in terms of the "inevitable effect" of the pattern built into the legislation, its "necessary scope and operation," and not merely by reference to indiscrete admissions. *United States v. O'Brien*, 391 U.S. 367, 385 (1968). Such evidence of design, pattern, or blueprint is what the Court relied upon in distinguishing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), from the draft card burning cases. Writing for the Court in *United States v. O'Brien*, 391 U.S. 367, 385 (1968) the Chief Justice emphasized that the crucial fact in *Gomillion* was, according to the Complaint, that:

[T]he "inevitable effect", 364 U.S., at 341, 81 S. Ct. at 127 of the redrawing of municipal boundaries was to deprive the petitioners of their right to vote for no other reasons than that they were Negro. In these cases, the purpose of the legislation was irrelevant, because the inevitable effect—the "necessary scope and operation," *McCray v. United States*, 195 U.S. 27, 59, 24 S. Ct. 769, 777, 49 L. Ed. 78 (1904)—abridged constitutional rights.

Justices Powell and Rehnquist similarly insisted upon objective evidence of design, blueprint, or pattern of discrimination in their dissent in *Rogers v. Lodge*, 458 U.S. 613, 630 (1982).

The creation of multi-member districts whose designs reveal unmistakably their discriminatory purpose would provide such objective evidence. Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). So would a pattern of decisions about the shape of individual districts if the discriminatory object of this blueprint of decisions was clear. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

This type of "objective" evidence is manifest in the present case (and will be whenever the gerrymander is significantly discriminatory). Even a stranger to Indiana who knew nothing of the history of this redistricting act would be able to tell that its purpose was to discriminate against likely Democratic voters, for that is the only purpose that explains a number of the central characteristics of the plan.

Objective evidence as to inevitable effect is hard to disguise. If a central purpose of the legislators who design the plan is either to maximize the representation of their own party (thereby minimizing the representation of the opposition) or to maximize the electoral security of incumbents of the majority party (thereby diluting the voting strengths of challengers and their supporters), a pattern of decisions must be taken affecting a number of districts. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In the case of Indiana, for example, an effort to accomplish either of these purposes requires actions designed with those purposes in mind in each of a sizable number of the 100 House and 50 Senate districts.

The pattern of actions constitutes a blueprint. Judges can easily read the purpose of the pattern just as an architect can understand the building a blueprint contemplates. Where the pattern of changes is so likely either to minimize the legislative representation of a political group or to maximize the electoral security of incumbents of the majority party that one of these purposes seems built into the design of the districting plan, or where unusual districts such as those electing several members on an at-large basis are used in ways strongly suggestive of these purposes, so long as there is no non-partisan explanation or set of explanations that has been applied consistently in creating the plan—in these circumstances the "objective factors" (*Rogers v. Lodge*, 458 U.S. 613, 631 (1981) (Justices Powell and Rehnquist dissenting)) overwhelmingly display discrimination.

B. The Court May Also Want to Require Historical Evidence of Subjective Motivation to Discriminate in Legislative Representation Against Citizens of Certain Political Views or Allegiances.

Even if the Court should demand that "objective factors" be supplemented by evidence going to subjective motivation revealed by the history of the plan, that requirement is fully satisfied in the present case. See *infra* pp. 25-26. Such a requirement may be appropriate. There is far less reason for the courts to review legislation accomplishing redistricting if the plan has been developed through a fair and open process and if there is no evidence revealed in that open process of an attempt to discriminate on the basis of policy views, political philosophy, or party allegiance.³

This form of evidence of discrimination, evidence from the history of the enactment of the redistricting statute, will be particularly hard to hide in cases of partisan gerrymandering. It may of course be true that the legislators drawing the plan will not, in the future, be frank about their purposes. But evidence of motivation flowing from a process that denies some members of the legislature access to information and to important stages of the deliberative process cannot readily be concealed. And if the members of the minority in the legislature are given access to the information used by the majority and to its deliberations, invidious discrimination would be apparent if that in fact was the purpose of the majority legislators designing the redistricting plan.

Thus the crucial evidence may consist of a process that excludes representatives of the legislative minority from crucial information, from committee deliberations, or

³ Some states have created independent reapportionment commissions to eliminate the partisan conflicts of interest that have pervaded the redistricting process. That such a commission was responsible for the development of a state plan would be strong evidence of the fairness of the procedure governing its creation.

from the opportunity for full and open debate. In the alternative, the evidence of motivation may come from the public statements or testimony of the designers and sponsors of the redistricting plan. If the process is fair and open, the legislative minority will see and hear direct statements of discriminatory purpose *if* they are prominent. If there is no such salient purpose revealed after an open process, the courts may sensibly decline further review.

C. The Court Need not Address the Case of a Redistricting Plan Whose Features Could be Explained as Based Upon Non-Partisan Criteria.

The concern that has been felt about the justiciability of gerrymandering claims assumes that the Court would be asked, and would undertake, to review districting plans that were not discriminatory on their face when overlaid against the background of the location of voters of identifiably different policy views, political philosophies, or party allegiances. If the plan, in its very terms, did not systematically discriminate for the very apparent purpose of diluting the impact of the votes of political opponents, then judicial review would require *either* finding in the Constitution a required set of districting criteria (such as compactness and respect for boundaries used in local government) *or* relying exclusively on evidence of the subjective motivation of particular legislators to discriminate against some groups. But both alternatives are questionable in this context.

As to the first, no current understanding of the requirements of the Fourteenth Amendment would justify deciding among districting plans that did not discriminate invidiously against a racial, ethnic, religious, or political group or against those of certain beliefs. Seeking constitutional requirements as to optimal or even acceptable shapes of districts would in fact plunge the courts into the realm of political theory.

As to reliance on subjective motivation alone, if there was no compelling and obvious pattern of discrimination when the districting plan was compared with the locations in the state of salient groups challenging the plan or if there were other consistent explanations for whatever pattern suggesting discrimination might emerge, a case of invidious discrimination cannot be made out even by evidence of "an alleged illicit legislative motive" (*United States v. O'Brien*, 391 U.S. 367, 383 (1968)) and certainly not by simply showing that the impact of the districting plan is to disadvantage a particular salient group. *Washington v. Davis*, 426 U.S. 229 (1976). These limitations are particularly important in the area of districting for, as the Court has recognized, there will always be evidence of partisan motivation and the majority party will always like the plan better than the minority party does.

This Court has held that a combined showing of *both* a disproportionately harmful impact on a particular political group *and* evidence of subjective motivation to discriminate against that group would be adequate for challenging a multi-member district on grounds of racial discrimination. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1981); *White v. Register*, 412 U.S. 755 (1972). Whether the same showing would be adequate to strike down a partisan districting plan even though it did not abuse multi-member districts and did not manifest *by its very terms* a pattern of invidious political discrimination, need not be decided at this time. For in this case multi-member districts *are* abused and the legislation itself *does* display a design characteristic of the purpose to discriminate on the basis of political views, philosophies, and allegiances.

Nor is the unaddressed problem of central importance. The worst abuses of gerrymandering—the greatest dangers to the political system—require districting plans that display an obvious pattern of discrimination when

overlaid on a "map" showing the location of salient political, racial, ethnic, or other groups, and plans which cannot plausibly be defended by pointing to any set of non-discriminatory criteria which have been consistently applied.

Thus, a party challenging a redistricting plan on the grounds of invidious discrimination based upon politically partisan considerations would, under traditional equal protection doctrine, have to show far more than that the impact of an apparently neutral redistricting plan fell disproportionately against one party. See *Mobile v. Bolden*, 446 U.S. 55 (1980); *Washington v. Davis*, 426 U.S. 229 (1976). Nor would it be adequate simply to show that the legislative history indicated an illicit legislative motive, without any showing of disproportionate partisan impact. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1967).

Even the two factors combined, which would together satisfy the requirements this Court has imposed for establishing unconstitutional racial discrimination in the creation of multi-member districts, may not be enough to raise a claim of politically partisan gerrymandering. For it may be permissible for the majority party in a legislative house to select among the various non-partisan criteria for districting those apparently neutral ones (e.g., compactness or following county lines) which, on the whole, favor the interests of the party controlling the legislature.

But an entirely traditional and manageable "equal protection" challenge to a districting statute is stated by a plaintiff who shows that the "objective factors" or "inevitable effects" that display its design or blueprint clearly demonstrate an intention to minimize the legisla-

tive representation of citizens of a particular policy view, political philosophy or party allegiance. No need of recourse to disputable political theory makes such a claim "political." It is a traditional application of equal protection doctrine to a situation only slightly different from those where similar concepts have long been applied. The case becomes even more familiar if the Court *also* requires a showing of discriminatory motivation from the history of the legislation (particularly the process through which it was considered). And the remedies regularly applied in reapportionment cases are equally available here.

Whether a legislative redistricting that was shown in both these ways to be invidiously discriminatory on the basis of beliefs and party loyalties could ever also be shown to be justified and explained by non-partisan criteria such as compactness or following county lines, this Court need not decide in the present case. In all likelihood a showing of the consistent use of non-partisan criteria would defeat any effort to establish the objective indicia of a discriminatory pattern. Still, we can assume for the purposes of this case that such a showing would also constitute a separate defense. The Indiana legislature has made no such showing.

III. THE DISTRICT COURT'S FINDINGS AND THE AGREED RECORD SUPPORT A CONCLUSION THAT THE INDIANA REDISTRICTING PLAN VIOLATED FAMILIAR AND TRADITIONAL DOCTRINES OF EQUAL PROTECTION.

Political gerrymandering is always an effort either to increase the number of seats held by the majority party or to increase the security of incumbents (either all incumbents or, more often, those of the majority party) or to do some of each. A pattern of decisions, affecting some or all of the districts in a state, that can only plausibly be explained by one of these motivations is intended to do

and does, in fact, reduce the representation of those who have been identified as having beliefs, political philosophies, or loyalties that may lead them to support the minority legislative party or to support challenges to incumbents. The evidence of this in the present case is very clear.

A. The "Inevitable Effect" and "Necessary Scope and Operation" of the Redistricting Statute Manifests a Design to Discriminate Against Those of Particular Political Views and Allegiances.

This Court has long treated the creation or maintenance of multi-member districts, where the impact is to submerge the views of "racial or political elements of the voting population," as a matter requiring a particular search for a discriminatory motivation and purpose. The suspicion is quickly confirmed in the present case. Alternatively, the necessary evidence can be found in the overall pattern of the redistricting decisions.

1. The Misuse of Suspect Multi-Member Districts.

The Indiana State plan reveals a melange of single-, double-, and triple-member districts, with no consistent, non-discriminatory principles explaining the assortment. The multi-member district lines break through city and county lines, creating new large districts out of a bewildering hodgepodge of political divisions. But the hodgepodge is readily explained.

The largest multi-member districts, in Marion and Allen Counties, betray brazen manipulation of district sizes and lines for clear partisan ends. The pattern, as would be expected, reflects decisions to "waste" Democratic votes in two ways: by concentrating them in excess of what would be required by winning candidates—"stacking"—and by splitting them in support of losing candidates—"cracking."

The choice to have multi-member districts in Marion County—and draw the particular districting lines chosen

—involved both "stacking" Democrats and "cracking" and submerging them. Although the population of Marion County entitles it to almost exactly 14 representatives, the State plan created five three-member districts by reaching beyond the County borders and annexing areas from two different counties. Of these five large districts one (District 51) was heavily stacked with Democrats—the 1982 House races went to Democrats by more than 80 percent—and the others went safely, but not "wastefully" to Republicans. (Nearly all won by 55 to 60 percent.) (JA-(39-40))⁴ The Democrats won 48.5% of the Marion County vote in 1982 and only three out of its fifteen seats. (Def. Ex. X; Nov. R. 126 and 127)

That the Republicans won 12 out of 15 seats in the area was not just a product of concentrating Democratic votes in the central 51st district. As the district court below notes, the urban Democrats who were not included in the 51st district were split among three different multi-member districts. (A-15) In addition, the extreme peculiarities of the areas encompassed by District 48, one of the Marion County districts that the Republicans had to extend into other county land to create a three-member district, forced the lower court to conclude, "[t]here is simply no conceivable justification for this kind of district." (A-15)

The manipulation of districts in Allen County manifests the same discriminatory designs. The two three-member districts created here "[bisected] Democratic strength in the urban area." (A-16) Not only do the districts divide the urban Democratic voters, the necessary population to justify large three-member districts, which swamped the split urban Democratic voters, is produced by going beyond Allen County into three different

⁴ References to the Joint Appendix are in the form "JA-." References to the opinion of the court below, which is set forth in Appendix A to the Appellants' Jurisdictional Statement, are in the form "A-."

neighboring counties. Thus District 20 is created out of a mixture of urban Democrats in Fort Wayne and farmers in outlying counties. The result is two districts that are safely, but not "wastefully," Republican. (In District 20 all three seats were won by Republicans in the 55 to 60 percent range, and in District 19—the other three-member district—the seats went Republican by slightly more than 60 percent.) (JA-(39-40))

The multi-member districts in Marion and Allen Counties illustrate precisely the pattern of decisions one would expect to see in a gerrymandered plan, with precisely the consequences. Democrats were effectively disenfranchised. Of the twenty-one representatives elected from these districts, only three were Democratic (14 percent), despite the fact that the vote was more than 46 percent Democratic. (Def. Ex. X; Nov. R. 126 and 127) As these twenty-one representatives account for more than one-fifth of the Indiana House, the discriminatory structuring of these multi-member districts significantly contributed to the discriminatory impact of the overall plan.

2. The Pattern of Discriminatory Actions Regarding all Districts.

The best objective evidence of a discriminatory effort to reduce the representation of those of particular political beliefs or allegiances consists of the pattern of additions and subtractions of areas to create new districts in a gerrymandered redistricting plan. One would expect, for example, an effort to increase the percentage of supporters of the majority party in any district that party had barely won or had almost won, at the expense of reducing the number of supporters in overwhelmingly friendly or overwhelmingly hostile districts. Where areas populated with supporters or opponents are added to or separated from previous districts in a way that displays a systematic effort to make safer the seats of "marginal" incumbents of the majority party or to remove the seats of "marginal" incumbents of the opposition, the objective pattern displays the discriminatory purpose.

In this case the best evidence of purpose is unavailable because the Republican legislative majority has never shared with anyone else the information about party percentages in each precinct on which it based its redistricting plan. *See infra* p. 25. Thus in this case we cannot examine the districts in terms of the percentages of Republicans and Democrats in each area that were included and excluded. Nonetheless, visual inspection of the districting map as well as various statistics provide strong indication of a pattern of discrimination.

First, some central purpose was plainly at work, overriding traditional concerns in districting. The Indiana plan aggressively disregarded existing political boundaries such as city and county lines. For example, despite a state constitutional prohibition against division of county lines for senatorial districts, the 1981 plan divided counties in Indiana 73 times. The district court opinion is replete with examples of bizarre combinations of political subdivisions. (A-(15-16), A-(28-29)) Moreover, as the district court points out, to add further confusion there is no relationship between the House and Senate districts, although fifty Senate districts would be more readily created by simply pairing each of the one hundred House districts with one another.

Second, the impact of all this was far from random. The results of the 1982 races reveal precisely the effects one would expect from a gerrymandered plan. First, and most obviously, the Democrats lost a very clear majority of the House seats (they won 43%) despite having a majority of the statewide vote. (A-12) Not only did they lose, but the way in which they lost shows how difficult, if not politically infeasible, it would have been for them to win a majority of the House. In the district with the 51st largest Democratic House vote, the Democrat lost by more than 1600 votes, a safe Republican victory. (JA-39)

Finally, and most revealing, the Table below comparing election results before and after redistricting in the House conforms to the vote distribution changes gerrymandering produces. The Table shows the percentage of Democratic and Republican House seats in 1980 and 1982 that were won overwhelmingly (greater than 60%), won "safely" (55 to 60%), and won marginally (50 to 55%). As expected, in 1982 compared with 1980 Democrats won a greater percentage of their seats overwhelmingly—they had to waste more votes. By contrast, in 1982 compared to 1980 Republicans won a far smaller percentage of their seats by large margins and a far greater percentage by a secure but not excessive margin.

Table
Percentage of House Seats Won by Various Margins
in 1980 and 1982

Democratic Victories		
	1980	1982
Won by:		
60% +	54% (20) ⁵	63% (27)
55-60%	38% (14)	19% (8)
50-55%	8% (3)	19% (8)
Republican Victories		
	1980	1982
Won by:		
60% +	70% (44)	35% (20)
55-60%	10% (6)	51% (29)
50-55%	21% (13)	14% (8)

⁵ The absolute number of races won by this percentage of votes.
(Note: These figures are derived from the General Election Statis-

B. The Historical Evidence Establishes Discriminatory Motivation and Purpose.

Historical evidence of the motivating force of a plan to deny representation to those of certain views or party allegiances is best seen in a record of closed processes, manifesting an intent to hide the basis of decision by the legislative majority. Sometimes, it will also be provided by public statements or testimony.

1. The Abuse of Fair Legislative Process.

The legislative process itself was clearly designed to maximize the majority's opportunity to discriminate by excluding the participation of minority party members at every phase. Democrats were excluded from voting membership on the conference committee responsible for the mapmaking process, excluded from the data provided to a computer firm to analyze the implications of alternative mapmaking schemes, and excluded from the findings generated by the computer.

No hearings on reapportionment were ever held. *The Indiana Journal* reports comments by Senator Townsend for April 30, 1981 that the Democrats had only 40 hours to review the districting of more than 4,000 precincts. And the conference committee report was only introduced at the last minute, on the final day of the regular legislative session. As the lower court found, "the minority party was intentionally precluded from participating in the process by which the present plan was drawn up." (A-31)

Discriminatory procedures serve discriminatory ends. Here Democrats were excluded from the redistricting process to minimize their opportunity to prevent the discriminatory plan from being implemented.

tics in Def. Exs. X and W; Nov. R. 126 and 127. In each multi-member district the calculations of the margins of victory were based on comparing the votes received by each victor with the losing candidate of the opposite party who did best.)

2. *The Statements and Testimony.*

The flagrantly discriminatory procedures merely reflected what the mapmakers themselves candidly acknowledged that they set out to do. Speaker of the House Dailey testified in his deposition that maintaining or creating multi-member districts in Marion County was intended "to save as many incumbent Republicans as possible." (A-9) More pointedly, he admitted that the only reason multi-member districts were used there was to avoid the Republican losses that single-member districts might entail. (JA-19)

Charles Bosma, Chairman of the Senate Elections Committee, testified that one of their priorities was "to protect those who were already serving, particularly of our own party." (JA-13) He went on to admit that the plans were drawn to "hurt the Democrats as much as possible within the U.S. Supreme Court's guidelines." (JA-15)

C. There was no Adequate Showing by the Appellants that any Set of Non-Discriminatory Criteria was Consistently Applied to the Design of the Redistricting Plan.

Although appellants claim that neutral criteria account for the Indiana redistricting legislation, at least one of their criteria was so vague and broad that it serves more to obscure what was done than to explain the true controlling factors. The "neutral criterion of 'least changed plan'" acted as a wild card, allowing the majority party to preserve selectively features of the old plan that favored Republican incumbents and radically alter others to their benefit.

Specifically, appellants' brief states that "[t]he Indiana reapportionment acts also followed the neutral criterion of least changed plan by preserving multi-member districts in the House" (Appellants' brief at 30) Appellants wish us to believe that the large multi-member districts in Marion and Allen Counties inevitably follow

from this "neutral" factor. But only one of the features of the old plan in these counties was their size. A feature equally characteristic of the districts in Marion County was that they all had fit neatly within the county borders. Yet, rather than retain the historical boundaries and change the size of some of the multi-member districts or shift to single-member districts, the majority party expanded the districts beyond Marion County lines into two other counties. Similarly, the three-member character of Districts 19 and 20 (largely Allen County) was retained, but at the cost of changing District 20, which had taken parts of Adams, Allen, and Wells Counties and creating a new Adams, Allen, Noble, and Whitley County district. What appellants try to pass off as the consistent application of neutral factors is the selective application of discriminatory ones.

More remarkably, appellants' other supposedly neutral explanation for the retention of multi-member districts effectively acknowledges the discrimination. They state that multi-member districts in the House were continued "except where all of the Representatives from any such multi-member district, of either party or race, requested a change to single member districts." (Appellants' brief at 7) But the self-interest of incumbents that have benefited from past discriminatory districting is not a neutral factor. In Marion and Allen Counties large multi-member districts that split and submerged Democrats were necessary to elect Republicans to 18 out of 21 seats. Allowing the Republican representatives in these counties to veto single-member districts made Republican partisanship the true deciding factor. Giving the three Democratic representatives as well the opportunity to reject single-member districts did not make this factor neutral.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court below.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,
v. *Appellants,*

IRWIN C. BANDEMER, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

No. 84-1244

SUSAN J. DAVIS, *et al.*,
v. *Appellants,*
IRWIN C. BANDEMER, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana

**BRIEF AMICUS CURIAE OF THE
REPUBLICAN NATIONAL COMMITTEE
IN SUPPORT OF APPELLEES**

The Republican National Committee submits this brief as *Amicus Curiae* in support of Appellees' claim that the judgment of the United States District Court for the Southern District of Indiana, entered on December 13, 1984, should be affirmed. Pursuant to Rule 36.2, all parties to this appeal have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS

The Republican National Committee argues in support of the Democratic Appellees because gerrymandering is a two-edged sword with which members of a political party may either carve or be carved. It is the belief of the Republican National Committee that egregious partisan gerrymandering in several states dilutes the opportuni-

ties for Republican candidates for Congress and state legislatures. Of course, as in the instant case, the tables can be turned.

The National Republican Party and its adherents, represented by the Republican National Committee, enjoy a constitutionally protected right of political association. The Republican National Committee seeks fair redistricting procedures nationwide because grossly partisan gerrymandering infringes on that right.

SUMMARY OF THE ARGUMENT

Partisan gerrymandering is an issue ripe for this Court's consideration. Twenty-three years after the Court provided relief from malapportioned redistrictings, millions of voters are denied fair and effective representation in their state legislatures and in the U.S. House of Representatives. Increasingly sophisticated computer technology makes equipopulous gerrymandering simple and effective.

Partisan gerrymandering affects not only individual voting rights, but by diluting the effectiveness of political parties in the electoral process, violates the right of free association of political party members. By restricting competition between political parties, gerrymandering insulates legislators from part of their constituency, thus undermining a basis of our democracy.

The fundamental importance of this issue compels the need for the Court, in light of its prior redistricting decisions, to establish a general framework to assess such claims. The history of the United States has seen a continuing expansion of suffrage, and the courts have applied a manageable, case-by-case standard of review of claims of diminution of voting strength.

Partisan gerrymandering is readily identifiable, as are the victims of gerrymandering, those who support a particular political party. While there may be no one indicium of unconstitutional gerrymandering, there exist a

variety of neutral criteria which, when considered in total, may raise a rebuttable presumption of gerrymandering. Legitimate state policies are not threatened by application of this standard since such interests may be used to justify a challenged redistricting.

The Republican National Committee agrees with the analysis of the district court that partisan gerrymandering violates the equal protection clause of the fourteenth amendment, but also believes this practice violates the political association and speech rights of the Republican party and its supporters as protected by the first amendment.

ARGUMENT

I. A REQUIREMENT OF POPULATION EQUALITY DOES NOT ALONE PROTECT AGAINST VOTE DILUTION

A. The Pursuit of Equipopulous Districts Is By Itself Insufficient to Safeguard the Rights of Voters to Enforce Their Will

The requirement of equipopulous legislative and congressional districts provides one protection against the impairment of an individual's right to vote. However, as the Court noted in *Karcher v. Daggett*, 462 U.S. 725 (1983): "[B]eyond requiring States to justify population deviations with explicit, precise reasons, which might be expected to have some inhibitory effect, *Kirkpatrick* [v. *Preisler*, 394 U.S. 526 (1969) requiring a good-faith effort to achieve absolute equality in congressional districts] does little to prevent what is known as gerrymandering." 462 U.S. 725, 734 n.6 (1983). In fact, "the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort." *Karcher*, 462 U.S. at 752 (Stevens, J., concurring), quoting *Wells v. Rockefeller*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting); see also *Karcher*, 462 U.S. at 776 (White, J., dissenting).¹

¹ In the introduction to its analysis of the current congressional districts nationwide, the editors of *Congressional Quarterly* noted:

The law of redistricting is being outpaced by the technology of redistricting. This Court's prior redistricting cases dealt with the problems at hand—districts unequal in population or which discriminate racially. These cases established the primary framework for all current redistrictings. That framework, however, is, by itself, insufficient to safeguard the very rights it was intended to protect—"fair and effective representation." Computer technology has dramatically changed the nature of the process, just as it has changed the contours of many states' redistricting maps along with the character of those states' legislative and congressional representation.² Not only do computers make possible equipopulous gerrymanders, they allow for a choice among an almost infinite variety of options. As Justice Stevens has noted: "Computers now make it possible to generate a large number of alternative plans, consistent with equal population guidelines and various other criteria, in a relatively short period of time, and to analyze the political charac-

"The nobly aimed 'one-man, one-vote' principle is coming into increasing use as a weapon for state legislators bent on partisan gerrymandering." Congressional Quarterly, *State Politics and Redistricting* at 1 (1982).

² In 1980, the National Conference of State Legislators noted that since "computer technology has come of age . . . the changing technology will have profound implications . . . in the 1980's redistricting activities of the state's Legislatures." *Reapportionment: Law and Technology* at 53. This report highlights the explosive growth of computer technology in the redistricting arena and notes three new dimensions this growth injects into the process: speed, numerous alternative plans and precision.

"The access of those who draw districting plans to sophisticated computerized redistricting data bases which include not just population data, but also information about party registration figures, previous election outcomes, and voting and demographic trends, makes it possible for map-makers to carry out the most sophisticated forms of gerrymandering while at the same time perfectly satisfying any equal population constraints that might be imposed." Grofman, *Criteria for Districting*, in *Electoral Laws and Their Political Consequences* 32 (Grofman & Lijphart, eds., 1985 forthcoming).

teristics of each one in considerable detail." *Karcher*, 462 U.S. at 752 n.10 (Stevens, J., concurring). See also *id.* at 776 (White, J., dissenting).³

In this case, the districting plan was drawn with the aid of a sophisticated partisan polling and computer firm. (Br. of Appellants 53). As is the increasing practice in many states, "reapportionment maps and the district lines could not be determined until the computer information was available" on magnetic tape provided by the United States Bureau of the Census. *Id.*

B. Computer Draftsmen Can Thwart the Will of the American Voter

The new technology available to redistricters provides those in the majority with a very tempting means of discriminating against any minority, political or otherwise. They can thereby control the outcome of elections without regard to the will of the voters. This was illustrated in the 1984 congressional elections in California. Democrats were elected to 27 of California's 45 seats—60 percent of the seats—even though Republican congressional candidates actually received more votes than Democratic candidates (49.4 percent Republican to 48.3 percent Democratic).⁴

³ Cf. *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982), where the five plans considered for Colorado's six-member congressional delegation each had districts which differed from one another by fewer than 100 persons, with several plans containing districts differing by fewer than a dozen persons. These plans were the distillation of numerous computer-generated and computer-assisted plans. The Court was called upon to choose because a partisanly divided state government failed to agree on a plan, because each of the five proffered plans differed considerably in their political effect. The court correctly declined to choose from among these plans simply on the basis of lowest population deviation (but constructed a plan incorporating the features of several plans).

⁴ Data indicating that Republicans in New York could, at times, capture a majority of seats with a minority of the statewide legislative vote were similarly a factor in *W.M.C.A. v. Lorenzo*, 377 U.S. 633 (1964). See *W.M.C.A. v. Simon*, 208 F. Supp. 368, 380 (S.D. N.Y. 1962); Brief for the Appellants at 28, 36, 120-22. This

On a national scale, gerrymandering thwarts the will of the American voters. Nationwide, in 1984, in contested congressional races, Republican candidates won nearly 500,000 more votes than their Democratic counterparts, but they won 31 fewer contested seats than the Democrats.⁵ These results stand in contrast to this Court's observation in *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) that: "Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators."

C. Legislators Should Not Be Allowed to Do Indirectly What They Could Not Do Directly

As this Court noted in *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

The right to vote can be undermined in many ways, directly or indirectly, sophisticatedly or simply, innocuously or invidiously. If a state legislature passed a law prohibiting members of a particular political party from voting, that law would be clearly unconstitutional. If the majority party passed a law that allowed minority party votes to be counted at only two-thirds their value, or which allowed minority party members a limited percentage of legislative seats at issue, the result would be the same. Likewise, if a political majority overtly passed a law stating that minority party members in a particular city were not entitled to have their votes counted, the constitutional violation would be clear. *United States v.*

disparity led some commentators to suggest that New York was "constitutionally Republican." Tyler and Wells, *New York: Constitutionally Republican in The Politics of Reapportionment* 221, 236 (M. Jewell, ed., 1962).

⁵ Clerk of the House of Representatives, *Statistics of the Presidential and Congressional Election of November 6, 1984* (1985).

Mosely, 238 U.S. 383 (1915); *United States v. Classic*, 313 U.S. 299 (1940).⁶

What would be impermissible if done overtly can, and does, occur covertly with the aid of the modern computer. The equipopulous gerrymander thus achieved should be just as unconstitutional as the less sophisticated, blatant equivalents.

Under the present state of the law, it is the draftsmen, not the voters, who determine legislative majorities. The appended exhibits at pp. 1a-2a, *infra*, demonstrate this. One need only recast the legislative district lines and superimpose 1984 vote totals on those lines. Using the 1984 Indiana Assembly vote for Marion County and its environs, it is possible to change the 12 to 3 Republican majority in Marion County's Assembly seats to an 11 to 4 Democratic majority, without changing a single vote cast. The fact that 1984 election results were used in this example, and that 1984 has to be considered a very good Republican year, strengthens the assertion that these Democratic majorities could be even stronger in a normal election situation. Of course, the ability to effect this "reverse gerrymander" is not conclusive proof that the actual districting is a gerrymander, but it does illustrate the options available to the clever cartographer.⁷ A sim-

⁶ One commentator has suggested the following hypothetical: "[Suppose] the post-*Reynolds* state legislature adopted a different means for the same end [and] announced that it would carefully study voting patterns, and then, intentionally, distributed urban voters into equipopulous districts so that their votes were effectively diluted by rural voters. This dilution could be achieved in several ways, but the result in all cases could be made to duplicate exactly the 'unrepresentative' proportions that existed in *Reynolds* itself, while maintaining the equipopulous districts required by the one person-one vote doctrine." Howard & Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615, 1636-7 (1983).

⁷ Copies of the data used to generate these maps have been lodged by the *amicus* with the Clerk of this Court. The "hypothetical Democratic gerrymander" uses a combination of multi-member and single-member districts to maximize Democratic can-

ilar result can be obtained by applying the 1984 congressional vote in California to new lines which would give Republicans a majority of that state's 45 congressional seats, again without changing a single vote.

Political gerrymandering removes control of legislative bodies from the hands of the electorate. In a very real sense, the underlying issue in this case is whether the American voters, or clever draftsmen and computer technicians, will decide the composition of America's legislative bodies. It is for this Court, addressing the problem now at hand, to act against the computer-generated gerrymander and protect against single-party domination of state legislatures and congressional districts, as it acted against rural domination two decades ago.

If the Court does not act to address this problem, the equipopulous gerrymander, as represented in the current California congressional redistricting plan, will flourish. Such plans will become the model, rather than an aberration.

II. PARTISAN GERRYMANDERING IMPERMISSIBLY BURDENS THE FIRST AMENDMENT RIGHTS OF POLITICAL PARTIES AND THEIR MEMBERS

A. The Adverse Impact on Political Parties Demands Their Inclusion in the Analysis of "Fair and Effective Representation"

The *amicus* supports the determination of the district court that partisan gerrymandering offends the equal protection clause of the fourteenth amendment. (Juris. St. at A-24.) Gerrymandering is a classic case of the discrimination that the equal protection clause forbids. The discrimination is in respect of the right of political association of those whose votes and voices are made to count for less by the gerrymander. That right is an "insep-

didate victories. If the plan were limited to three-member districts, as occurs under the current plan, Democrats would win nine of the fifteen districts, a shift of six seats solely dependent on the placement of the district lines.

arable" aspect of the liberty guaranteed by the fourteenth amendment. It is the means by which an individual's political freedom is exercised. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1957). The gerrymander can also fairly be seen as infringing directly on the right of political association without the mediation of equal protection. The case is thus a first amendment as well as an equal protection case. A first amendment analysis provides an effective means of balancing the constitutional interests of political parties and their members, in light of the legitimate interests of the state.

Robert Dixon viewed the relationship of the first amendment to redistricting cases thus: "Apportionment and districting arrangements have a more than casual impact on effective competition in the market place of political ideas. For without a fair opportunity to elect representatives, freedom of political association yields no policy fruits." Thus, he concluded, "First Amendment freedom of speech and of association, as well as Fourteenth Amendment interests, may be thwarted by discriminatory districting systems." R. Dixon, *Democratic Representation: Reapportionment in Law and Politics* 499 (1968).

B. This Court Has Recognized the Special Role of Political Parties in Our Political System

There is "no America without democracy, no democracy without politics, and no politics without parties. . . ." C. Rossiter, *Parties and Politics in America* 1 (1960). Political parties, and the candidate choices they offer voters, provide the single most important mechanism for incorporating voter preferences into decisions on public policy.

As a result, political parties and their adherents "enjoy a constitutionally protected right of political association." *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975). See Scalia, *The Legal Framework for Reform*, 4 *Commonsense* 40, 44-45 (1981); Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of*

Party Nominating Methods, 57 So. Cal. L. Rev. 213 (1984). "This First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State." *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121 (1981) (citations omitted). The constitutional protection accorded to political speech is at the core of the first amendment political activity. It "is more than self-expression; it is the essence of self-government." Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 18 (1965); see e.g., *Reynolds v. Sims*, *supra*.

Just as "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents," *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), any interference with the freedom of party adherents on the basis of their party affiliation or electoral tendencies interferes with the freedom of the party itself. That is why partisan gerrymandering is, in fact, "a major concern . . . only in a political system dominated by party politics." Backstrom, *et al.*, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Minn. L. Rev. 1121, 1122 n.9 (1978).

This Court has long recognized that "the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds v. Sims*, *supra*, at 562 (1964). Competition in the marketplace of ideas is the center of the electoral process and of the first amendment freedoms. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). Once these freedoms are implicated, the state must demonstrate a "compelling" interest if the restriction is to survive judicial scrutiny. *NAACP v. Button*, 371 U.S. 415, 438 (1963).

In *Anderson v. Celebrezze*, 103 S. Ct. 1564, 1570 (1983), the Court rejected a judicial "litmus-paper test"

to determine valid and invalid restrictions. Rather, the Court recognized the need to identify and weigh the legitimacy and strength of all relevant interests and to consider the necessity of burdening the plaintiff's first amendment rights. *Id.* A court must then determine whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity. *Lubin v. Parish*, 415 U.S. 709, 716 (1974).⁸

⁸ In *City of Mobile v. Bolden*, 446 U.S. 55, 122 (1980), Justice Marshall emphasized that any political minority seeking to invoke the protection of the fourteenth amendment must be sufficiently "cognizable" to be afforded relief. 446 U.S. at 122 (Marshall, J., dissenting). Justice Stevens, in his concurring opinion in *Karcher*, delineated the showing necessary to satisfy such a standard. In demonstrating that they are members of an identifiable political group whose voting strength has been diluted, "plaintiffs must show that they belong to a politically salient class . . . one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing districts." 462 U.S. at 754 (Stevens, J., concurring).

The most readily identifiable voting group is one based on political affiliation and voting patterns. See Clinton, *Further Explorations in the Political Thicket: The Gerrymander and the Constitution I*, 38 (1973) (cognizable interest group with coherent and identifiable legislative policy); Note, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. Chi. L. Rev. 398, 407-408 (1974) (clearly identifiable and stable group). The courts readily recognize the identifiability of racial voting groups, even though the basis for the identification—the United States Census—is updated only once per decade. Voting patterns, on the other hand, are identifiable at least every two years.

Voters who tend to vote for a party's candidates are reasonably identifiable and quantifiable. See, e.g., Niemi, *Can Fair Districting be Achieved? Political Gerrymandering in Light of Brown v. Thomson and Karcher v. Daggett* in *Electoral Laws* 22 (B. Grofman and A. Lijphart, eds., 1985 forthcoming). (Citations are to manuscript.)

The Court has recognized that political groups are cognizable in *Gaffney v. Cummings*, 412 U.S. 735 (1973). Furthermore, both the Congress and the federal courts have recognized that Republicans are sufficiently identifiable for purposes of relief under the post-Civil War Ku Klux Klan Act. 42 U.S.C. § 1985(3). This Court has confirmed that the statute does provide protection

C. Partisan Gerrymandering Impairs the Right of Free Association

Partisan gerrymandering seriously restricts first amendment rights by placing burdens on the freedoms of expression and association. An unrestrained legislature can manipulate district lines to such a degree as to provide one party a virtual monopoly in the marketplace of ideas. In *Williams*, the Court held that Ohio's ballot access laws were repugnant to the first amendment because the electoral process gave a decided advantage to some political parties over others. The state laws burdened "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." 393 U.S. at 30. The complete, partisan monopoly in Ohio offended the first amendment by placing unequal burdens on *both* the right to vote and the right to associate.

Partisan gerrymandering is even more starkly offensive to the first amendment because district lines are drawn specifically to negate the effect of the votes of members of certain parties. Although there is no right to the *most* effective speech possible, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 36 (1972), the right to cast effective votes ranks "among our most precious freedoms," *Williams*, 393 U.S. at 30. When voters are identified on the basis of party affiliation and are relegated to a district designed to eliminate their ability to affect the outcome of an election, the denial is not one of the "most effective" speech, but an elimination of the right to participate in the electoral process.

In *Anderson v. Celebrezze*, 103 S. Ct. 1564, 1572 (1983), the Court found unconstitutional Ohio's early

against certain civil rights violations on the basis of political affiliation. *United Brotherhood of Carpenters and Joiners of America v. Scott*, 103 S. Ct. 3352 (1983); *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

campaign filing deadline because it threatened "to reduce diversity and competition in the marketplace of ideas." The deadline discriminated against voters with a particular political orientation and thereby contravened the associational freedoms of the first amendment. As the Court noted, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint [or] associational preference" *Id.* at 1572 (footnote omitted). However, it is precisely for the purpose of imposing such restrictions on political parties that gerrymandered district lines are drawn.

Gerrymandering infringes on first amendment associational rights because it dilutes the impact of voters with a particular partisan association or view. It is "a fundamental tenet of American democracy that a representative government must be responsive to the changing will of the electorate." Grofman, *Criteria for Districting*, in *Electoral Laws and Their Political Consequences* 31 (B. Grofman & A. Lijphart, eds., 1985 forthcoming).⁹ Districtings that are largely insensitive to electoral changes because they lock in "a particular partisan imbalance

⁹ The importance of political parties to the exercise of first amendment rights is part of our American political tradition. Our scheme of governance calls for majoritarian government, but through reflective representation, whereby our legislatures "reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices . . . were brought to bear on the decision-making process." (Bickel, *The Great Apportionment Case*, *New Republic*, Apr. 9, 1962, at 13, 14.) As a result, ours is a democracy in which parties as well as individuals are represented. Cf. *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259 (1977), where the Court recognized the constitutionality of a statute which required separate majorities of voters within city limits and those without for county charter referenda approval. See also *Hunter v. Erikson*, 393 U.S. 385, 393 (1969). ("The State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.")

through the use of dispersal and concentration techniques of gerrymandering," Grofman, *id.*, thwart the very purpose of political association.

Partisan gerrymanders "are designed to limit the effectiveness of organized political activity, and for that reason strike at the rights of free speech and free association guaranteed by the First Amendment." Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket*, 1 J. L. & Pol. 357, 373 (1984). By impairing the ability of the voters to change their representatives on election day, the gerrymander "limits use of political processes that the First Amendment is intended to protect." *Id.*¹⁰

Where, as here, an enactment affects fundamental rights of speech and association, it is subject to the "closest scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 25 (1975) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1956); accord, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Federal Election Commission v. National Conservative Political Action Committee*, 105 S. Ct. 1459 (1985)).

Whenever limitations are placed upon first amendment rights, particularly those involving speech and political association, the state may prevail only upon a convincing demonstration of a compelling governmental interest. *NAACP v. Button*, 371 U.S. at 438-39. Furthermore, "the burden is on the government to show the existence of such an interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). In the absence of a substantial and

¹⁰ Cf. Dixon's argument on behalf of the State of Connecticut in *Gaffney v. Cummings*: "There is a sharp distinction between good faith avoidance of known obstacles to fair expression of political opinion, and designing districts to slant the next election in favor of one element whether or not it has popular support. The former approach operates to 'free up' the political process by creating districts intrinsically fair to all contestants; the latter approach perpetuates or creates unfair patterns of representation." Appellees' Juris. St. at 61, *Gaffney v. Cummings*, 412 U.S. 735 (1973).

compelling state interest, the impairment of those first amendment rights should be struck down.¹¹

D. Gerrymandering Limits Competition in the Political Process

Partisan gerrymandering, because it destroys the competitive nature of our political process, eliminates any serious discussion of political issues in many congressional and legislative districts across our country. Individual voters, simply because of their party affiliation, are assigned to electoral districts where their votes are, by design, rendered without effect. Naturally, the activity of individuals in the political process is severely discouraged by grossly gerrymandered districts, which make the advocacy of particular candidates, or parties, a fruitless civic exercise.

"Rotten boroughs," the diseased fruit of the partisan gerrymander, cf. *Brown v. Thomson*, 462 U.S. 835, 856

¹¹ An alternative, though related, constitutional base could be Article IV, § 4, of the Constitution—The Guarantee Clause. While the Clause has been called a "sleeping giant," Cong. Globe, 40th Cong., 1st Sess. 614 (1867) (remarks of Sen. Sumner), this Court in *Baker and Reynolds* appeared to qualify the notion that issues raised under the Guarantee Clause are inherently nonjusticiable. In those cases, the Court suggested only that "some questions raised under the Guarantee Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards." *Reynolds*, 377 U.S. at 582; *Baker*, 369 U.S. at 217-29.

It has been suggested that the clause may have a limited contemporary role, authorizing judicial action where individual rights defined in other provisions of the Constitution are threatened by structural defects in state or local government. Note, *A Niche for the Guarantee Clause*, 94 Harv. L. Rev. 681, 682 (1981). If a legislature becomes immutable to changing voting patterns—and therefore no longer republican—that legislature has become structurally defective, while concurrently diluting the rights of individuals and the candidates they support. *Id.* at 698. See generally, Rosenblum, *Justiciability and Justice: Elements of Restraint and Indifference*, 15 Cath. U. L. Rev. 141 (1966); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L. J. 517 (1966).

(1983) (Brennan, J., dissenting), citing *Reynolds*, 377 U.S. at 567-68; *Baker*, 369 U.S. 302-07 (Frankfurter, J., dissenting), simply demand no discussion of issues by their representatives. Many gerrymandered districts go uncontested, or are not seriously contested, so speech is not just diminished, it is eliminated. See *Baker, Representation and Apportionment*, III Encyclopedia of American Political History 1118, 1128 (J. Greene ed. 1984). Since the electoral process is, through clever computer-assisted cartography, foreordained, the marketplace of ideas is foreclosed to those whose party did not control the redistricting process.

The House of Representatives, the institution of our national government designed to be most responsive to the changing will of the electorate, has been substantially isolated from partisan change through increasingly sophisticated gerrymandering. A transient political majority now can effectively limit the ability of the electorate to change its representatives in any legislative body without extraordinary majorities. This insulation of legislators from the will of the electorate violates fundamental notions of our democracy:

As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people.

The Federalist No. 51, at 329 (J. Madison or A. Hamilton) (Henry Cabot Lodge ed. 1892).

A Congress, or legislature, elected in districts cleverly gerrymandered, is neither immediately dependent upon nor in intimate sympathy with the voters, for the ability of voters to change control of the legislatures has been severely attenuated. Recent electoral patterns show that the Senate has a more volatile membership than the House of Representatives. Price, *Bringing Back the Parties*, CQ Press 59 (1984). The House of Representa-

tives is now, in the opinion of many observers, increasingly immutable to the changes in the political views of the people.

Incumbents in the House enjoy a significant advantage. Not only are more incumbents running than ever, but incumbents are winning by increasing margins. *Id.* at 58. In 1984, there were more incumbent candidates running for "safe" seats than in previous election cycles; 315 incumbent candidates won with 60 percent or more of the vote, while another 48 incumbents won 55 percent to 59 percent of the vote. In addition, there were "an unusually small number of House seats in which the incumbent did not run for re-election."¹² This House imperviousness and Senate volatility are exactly the opposite of the express intent of the framers of our Constitution. A substantial reason for this phenomenon is gross partisan gerrymandering. If the Court fails to recognize this errant and arrogant abuse of our political process, the ossification of the House of Representatives and numerous legislatures—and the attendant distortion of our system—will only accelerate.

III. PARTISAN GERRYMANDERING IS A JUSTICIABLE ISSUE

A. Justiciability Is an Evolving Concept

The arguments raised against the justiciability of egregious political gerrymandering harken back to those voices raised in opposition to this Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962). The Court accurately observed that "[m]uch confusion results from the capacity of the 'political question' label to obscure the need for a case-by-case inquiry," *id.* at 210-11.

The history of the United States "has seen a continuing expansion of the scope of the right of suffrage in this country." *Reynolds v. Sims*, 377 U.S. 533, 555

¹² Source: *The FEC Reports on Financial Activity, 1983-84: U.S. Senate and House Campaigns, Interim Report No. 9* (1985).

(1964).¹³ The political system and the Court have, for the most part, accommodated this expansion. Justiciability, like suffrage itself, is an evolving concept as reflected in the history of the judicial review of claims of diluted voting rights. In concluding that "[c]ourts ought not to enter [the] political thicket" of redistricting in *Colegrove v. Green*, 328 U.S. 549, 556 (1946), the Court suggested that the "remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress." *Id.* Recourse to the legislatures was futile since the condition of inequality complained of benefitted the very officials asked to change it.

Increasingly malapportioned legislative and congressional districts, together with legislative intransigence, provided a different result in the 1960's. In *Baker*, this Court insisted on "the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." *Baker*, 369 U.S. at 217.

Rejecting arguments of judicial incapacity, this Court concluded in *Baker* that there were judicially manageable standards by which an allegedly unconstitutional redistricting could be identified and remedied:

Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

Id. at 226.

As this Court recognized in *Baker*, the federal district courts are fully equipped to resolve redistricting cases in

¹³ As the Court suggested in *Reynolds*, the fifteenth, seventeenth, nineteenth, twenty-third, twenty-fourth, and twenty-sixth Amendments to the Federal Constitution, the civil rights legislation of 1957, 1960, and 1964 (as subsequently amended), and the Court's consistent line of decisions on voting rights all involved expansions of the right of suffrage. 377 U.S. at 554-6 & n.28.

a manageable and thoughtful manner, consistent with the facts presented by each case. In *Baker*, the question of relief was left to the district court, because the Court had "no cause . . . to doubt the District Court will be able to fashion relief if violations of constitutional rights are found" *Id.* at 198. See also *Reynolds v. Sims*, 377 U.S. at 556. There is no reason to believe that the district courts are only less equipped in gerrymandering cases than in any other redistricting cases to draw and implement legislative or congressional plans applying neutral criteria. As Justice Douglas noted in his concurrence in *Baker*, "The justiciability of the present claims being established, any relief accorded can be fashioned in light of well-known principles of equity." *Baker*, 369 U.S. at 250 (Douglas, J., concurring).

In *Baker*, the circumstances called for equitable relief, and the Court responded by giving the plaintiffs the opportunity for such relief. That a case involves gerrymandering fails to provide any lesser basis for deciding the controversy. Indeed, to refrain from decision would be to reach the remarkable conclusion that a legislative majority, by the happenstance of its presence when the day for redistricting arrives, entrenches its party in power, free of any effective concern for the rights accorded voters by the first and fourteenth amendments.

B. The Court Should Provide a General Framework for Litigation of Such Claims

This Court noted, in 1964, that protection of the fundamental right to vote requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). The same year, in *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that "an honest and good faith effort" to construct equipopulous districts is required. *Id.* at 577.

Rather than imposing a rigid framework upon the district courts by which they must measure claims of vote dilution in legislative and congressional cases, this Court

has wisely insisted that the district courts review the specific circumstances of each case. In *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969), the Court refused to adopt a fixed numerical standard for measuring population variances between congressional districts "without regard to the circumstances of each particular case." Likewise, in a state legislative case, the Court concluded that when reviewing population-based representation, "the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation. . . ." *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (emphasis added).

Through three redistricting cycles over two decades, federal district courts—and state courts applying federal constitutional principles—have methodically reviewed the scores of redistricting plans brought before them and, as a result, the legislative and congressional districts of virtually every state are relatively equipopulous.

However, even as population disparities among districts have dwindled, the underlying problem this Court sought to address in *Baker*, *Wesberry*, and *Reynolds*—the dilution of a citizen's right to vote—continues to plague our electoral system. Criteria for recognizing the gerrymander (and eliminating it) are set forth in the following section. These criteria offer a workable framework for litigation of such claims.

IV. PARTISAN GERRYMANDERING IS IDENTIFI- ABLE

A. The "Totality of the Circumstances" Analogy

Partisan gerrymandering persists and is very effective. See *supra* § I(B). It is sufficiently widespread to affect numerous congressional and legislative races, yet there are objective, quantifiable standards by which to assess a partisan gerrymander. The Court need not rely solely on Justice Stewart's definition of obscenity—"I

know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)—to determine that a redistricting plan is a gerrymander.

In his classic work on the law of reapportionment, Robert Dixon suggested: "Gerrymandering is discriminatory districting. It equally covers squiggles, multi-member districting, or simple non-action, when the result is racial or political malrepresentation." R. Dixon, *Democratic Representation: Reapportionment in Law and Politics* 460 (1968). In other words, gerrymandering exists when votes are not accorded the same weight on the basis of party affiliation. This is a reasonable and manageable definition. To determine the relative weight of the votes of a political group, the cumulative effect of a number of factors provides a proper framework for analysis on a case-by-case basis. In similar manner, the Congress intended, and the courts successfully apply, a "totality of the circumstances" test to claims of racial vote dilution under Section 2 of the Voting Rights Act of 1965, as amended. The Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (1965), as amended by the Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973(b) (1982); Senate Comm. on the Judiciary, Report on the Voting Rights Act Extension, S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 177 (hereinafter "Senate Report.")¹⁴

¹⁴ These factors were derived from the analytical framework of *White v. Regester*, 412 U.S. 755 (1973), as expanded in *Zimmer v. McKeithen*, 485 F.2d 1295 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 635 (1976). In approving the 1982 amendments to the Voting Rights Act, the Senate Judiciary Committee explicitly adopted the "result standard" articulated in *White*, concluded that it was unnecessary for purposes of Section 2 of the Act to make a finding or require "proof as to the motivation or purpose behind the practice or structure in question." Senate Report at 28.

The resulting statutory language provides a possible framework for a first amendment analysis by the Court in gerrymander cases:

In Voting Rights Act cases, the courts must assess the cumulative or total effect of circumstances giving rise to a claim of racial vote dilution, since any one of the relevant measures alone may be insufficient to support a claim under the statute. This type of analysis would be effective and not particularly novel for the courts to use when considering gross partisan gerrymandering claims.¹⁵

In fact, in *Williams v. Rhodes*, in which the Court rejected an Ohio law limiting ballot access by new political parties, this Court looked to the "totality of the Ohio restrictive laws taken as a whole. . . ." 393 U.S. 23, 34 (1968). The Court concluded that, in their totality, the

A violation . . . is established, if based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.

Voting Rights Act Amendments of 1982, Subchapter IA, § 1973(b).

The Congress suggested a variety of factors which, when viewed in totality, would be indicative of vote dilution. Senate Report at 28-29.

¹⁵ In rules newly proposed by the Department of Justice, the following are to be considered "relevant factors" in determining a basis for objection: "(4) The extent to which the districts created by the submitted plan needlessly depart from objective redistricting criteria such as compactness and contiguity or follow a unique configuration that inexplicably disregards prior district boundaries, boundaries of districts of other contemporaneous plans, political boundaries, prior precinct boundaries, natural boundaries, or man-made physical boundaries. (5) The extent to which the submitted plan is inconsistent with the jurisdiction's stated redistricting boundaries." Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 50 Fed. Reg. 19122, 19131 (1985) (to be codified at 23 C.F.R. § 51).

In 1984, the Department of Justice reviewed 274 redistricting changes. (Source: Section 5 Unit, Voting Section, U.S. Department of Justice). If such neutral criteria are unmanageable, why would the Department of Justice impose such a burden on its review of hundreds of redistrictings annually?

laws imposed an unconstitutional burden on voting and associational rights. *Id.*

B. Standards for Measuring a Gerrymander

A partisan gerrymander may be found to be constitutionally repugnant when the technique is used to minimize or cancel out the voting strength of political elements of the voting population in violation of the first amendment, or when one political party has been discriminated against in such a fashion that its supporters have been denied an equal opportunity to participate in the political process and elect candidates of their choice.

While numerous measures have been suggested to determine whether or not a gerrymander has occurred, one should always begin with the oldest of such measures—the vote. Although the *amicus* acknowledges this Court's repeated admonition that no group is entitled to representation in proportion to its strength in the population, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the proportion of congressional or legislative seats won to the number of votes cast for a party's candidate serves, at least, as an objective measure of the impact of a challenged districting plan.¹⁶ Proportions of votes to seats are simply one available, easily definable, measure. When, for example, a party wins the majority of votes but a minority of the seats, something is surely amiss. Whenever a party's seats are seriously less in proportion than that party's share of the vote, reason for careful scrutiny almost surely exists.

Political and social scientists recognize a variety of neutral criteria by which gerrymandering can be demonstrated. One author has identified "Twelve Prima Facie Indicators of Gerrymandering" and three "Warning

¹⁶ The *amicus* agrees with the proposition that ours is not, nor should be, a proportional system of government. The credentials of the Republican National Committee as a proponent of strong, two-party government in the United States are indisputable. The *amicus* does not argue that proportionality should be the goal of

Flags" of probable gerrymandering, which he, as an expert witness, used to analyze California's congressional plan in *Badham v. Eu*, 568 F. Supp. 156 (N.D. Calif. 1983). These fifteen factors are set out in Grofman, *Criteria for Redistricting*, *supra*, at 35-37. Each of the gerrymandering techniques or indicators discussed *infra* is based on one, or more, of Professor Grofman's fifteen factors or warning flags.

(1) *Unnecessarily disregarding compactness standards in drawing district lines.*

There exist measures of compactness with a meaningful starting point and unambiguous measures of deviation from that point. Depending on the configuration of the district, compactness can be measured by summing the length of aggregate boundaries¹⁷, computing the absolute value of the difference between the length and width of the district¹⁸, calculating the ratio of the area of a district to the area of the smallest possible circumscribing circle¹⁹, or by a combination of these and other methods. In *Karcher*, Justice Stevens, quoting Professor Dixon, warns "against defining gerrymandering in terms of odd shapes." 462 U.S. at 755 n.15 (Stevens, J., concurring). But, he said, dramatic "departures from compactness are a signal that something may be amiss." *Id.* at 758. See also: R. Dixon, *Democratic Representation: Reapportionment in Law and Politics* 460 (1968); B.

redistricting, but rather that it be one measure of the basic fairness of a districting plan.

¹⁷ B. Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective" Representation*, 14 Harv. J. On Legis. 825 (1977).

¹⁸ Iowa Code § 42.4(4)(b) (1983), L. Eig and M. Seitzinger, *State Constitutional and Statutory Provisions Concerning Congressional and State Legislative Redistricting*, Cong. Research Serv. 55 (1981).

¹⁹ Reock, *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 Midwest J. of Pol. Sci. 70 (1971).

Grofman, *Criteria for Districting*, at 12.²⁰ Justice Stevens was undeniably correct.

(2) *Unnecessarily disregarding city, town, county, and geographic boundaries in drawing district lines.*

As the Court indicated in *Reynolds v. Sims*, and Justice Stevens noted in *Karcher*, "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Karcher v. Daggett*, 462 U.S. at 758 (quoting *Reynolds v. Sims*, 377 U.S. at 578-79) (footnote omitted). City or town and county boundaries were also recognized by this Court in *Brown v. Thomson*, 462 U.S. 835 (1983), as playing an important role in state and federal government administrations. Accordingly, "[e]xtensive deviation from established political boundaries is another possible basis for a prima facie showing a gerrymandering." *Karcher*, 462 U.S. at 758 (Stevens, J., concurring).

(3) *Unnecessarily disregarding communities of interest in drawing district lines.*

While less explicit than local government jurisdictional boundaries, "historical" boundaries or those dividing "communities of interest" are often discernible, and, in some states, have very explicit, determinable boundaries that have been used by state and federal courts in the redistricting process. [California: *Legislature v. Reinecke*, 10 Cal. 3d 396, 110 Cal. Rptr. 718, 516 P.2d 6 (1973);

²⁰ Many state constitutions contain compactness standards, at least with respect to legislative redistricting and the courts of several of these states have reviewed districting plans on this basis. *Schrage v. State Board of Elections*, 88 Ill. 2d 87 (1981); *In re Legislative Districting of General Assembly*, 193 N.W.2d 784, 791 (Ia. 1972); *Acker v. Lowe*, 178 Colo. 175, 178, 496 P.2d 75, 76 (1972); *Preisler v. Doherty*, 365 Mo. 460, 284 S.W.2d 427 (1955); *In re Livingston*, 96 Misc. 341, 160 N.Y.S. 462 (N.Y. Sup. Ct. 1916); *In re Sherill*, 188 N.Y. 185, 81 N.E. 124 (1907); *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40 (1912).

Colorado: *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982); New York: *Flateau v. Anderson*, 537 F. Supp. 257 (S.D.N.Y. 1982)]

(4) Packing, fragmenting, or submerging the voting strength of political parties.

Packing the voting strength of a party into particular districts insures that much of its voting strength is wasted in districts that are won by lopsided margins. Conversely, fragmenting or submerging the voting strength of a party among several districts helps turn that party into a near certain minority.

Just as these factors have been recognized by Congress, see "*Senate Report*," and this Court as one of the "circumstances" that may indicate illegal racial vote dilution, so also can they operate to dilute the vote of a political minority.

(5) Differential treatment of the majority party's and the minority party's incumbents.

A redistricting plan can impact on the reelection likelihood of a particular party's representatives by altering district boundaries to put two or more representatives from the same party into the same district, or by reducing the reelection likelihood of a party's representatives by cutting up old districts, or otherwise altering district boundaries so as to make it impossible for those representatives to continue to represent the bulk of their former constituents.²¹ One of the defenders of the California gerrymander argues that "the displacement of incumbents is perhaps even more important to the outcome of the

²¹ In California, e.g., the 22 Democratic incumbents who ran and won in 1982 had an average victory margin of 66.2 percent. None of the 22 Democratic incumbents who ran in 1982 had any other incumbent placed in the same district. However, in 1982, six of the Republican incumbents were placed together in a district with a fellow Republican; one (Clausen) was put into a district which was less favorable than his old seat (in which he ran and lost) and one (Dornan) had his district eliminated. See also: Grofman, *Criteria for Districting*, at 67.

first post-districting election than are many changes in the underlying partisan composition caused by redistricting." B. Cain, *Assessing the Partisan Effects of Redistricting* 15, presented at the Annual Meeting of the American Political Science Association, Chicago (Sept. 1-4, 1983).

In assessing the impact of gerrymandering on incumbents, Cain acknowledges: "The key then to the partisan gerrymander is that incumbents in the party controlling redistricting will be treated differently from those in the party that does not." Cain at 35. Thus, a combination of "partisan reconstruction" (i.e., changes in the distribution of partisan registration across districts) and the "artful removal of inconveniently placed incumbents" can be used to alter the seat distribution and make the majority party more "efficiently distributed" than the minority party. *Id.*

(6) Creating Partisan Advantage in Open Seats.

A political majority, especially where the number of seats increases in a reapportionment, may take advantage of open seats by creating "safe" seats for candidates of their own party. Once the seat is captured, the benefits of incumbency are also gained.²² The first post-districting congressional election sets in place almost all the incumbents, and thereafter, defeat of congressional incumbents who run for reelection is very rare. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 Polity 295 (1974). A consistent pattern of using new or open seats to favor the majority party's candidates is a valid indicium of partisan gerrymandering.

²² See, e.g., Erikson, *The Advantage of Incumbency in Congressional Elections*, 3 Polity 395 (1971); Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 Polity 295 (1974); M. Fiorina, *Congress: Keystone of the Washington Establishment* (1977); Ferejohn, *On the Decline of Competition on Congressional Elections*, 71 Amer. Pol. Sci. Rev. 166 (1977); B. Cain, *Assessing the Partisan Effects of Redistricting* (1983).

(7) Abusing the Process.

Finally, just as a truncated or irregular process in the enactment of a redistricting plan has been found to require explanation in other vote dilution cases so, too, is a procedural standard useful in partisan gerrymandering cases. A procedure such as that described in *Karcher v. Daggett* is the sort that might be suspect, where a legislature "swiftly" passed a redistricting bill that was signed by the outgoing governor just before a governor of the opposing party took office.

V. LEGITIMATE STATE POLICY INTERESTS MAY BE RECOGNIZED IN ARTICULATING THE CONSTITUTIONAL PRINCIPLES THAT LIMIT PARTISAN GERRYMANDERING

The *amicus* does not suggest that every plan that adversely impacts members of a political party or its candidates is constitutionally defective. Like any other right guarantee by the Constitution, political association is not absolute, and can be qualified if it conflicts with an important state interest. *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124-25 (1981). The *amicus* recognizes that redistricting is, and should remain, a political process. However, an articulated and compelling governmental interest may justify some abridgement of the associational rights affected by redistricting. As Justice Stevens observed in his concurrence in *Karcher*:

Although a scheme in fact worsens the voting position of a particular group, and though its geographic configuration or genesis is sufficiently irregular to violate one or more [neutral criteria], it will nevertheless be valid if the State can demonstrate that the plan as a whole embodies acceptable, neutral objectives.

462 U.S. at 725-26 (Stevens, J., concurring) (footnote omitted).

This principle provides sufficient protection to a state from excessive intrusion into its political affairs and policy judgments. Only after plaintiffs challenging a plan as a political gerrymander establish a *prima facie* case must a state justify its actions.

The Court has recently affirmed the use of such a rule in districting cases. *Karcher*, 462 U.S. at 730-31. There the majority emphasized its willingness "to defer to state legislative policies, so long as they are consistent with constitutional norms" All the state need show is that the legislative policies invoked to justify some deviation from perfect equality are "consistently applied" and relate to the plan "with some specificity." The showing required is "flexible," and requires "case-by-case attention." *Id.* at 750-41. See also, *Brown v. Thomson*, 462 U.S. at 848-49 (O'Connor, J., concurring).

While a fourteenth amendment analysis accommodates this view, challenges to a redistricting plan founded on a claim of first amendment violation can be analyzed by considering the character and magnitude of the injury to the right, the state's justifications for the burden, and the legitimacy and strength of the justifications in relation to the necessity of the burden. *Anderson v. Celebrezze*, 103 S. Ct. 1564, 1569-70 (1983). The balancing of interests which occurs in a first amendment context readily accommodates the conflicting interests present in a partisan gerrymandering case, with the first amendment merely giving weight to the right allegedly infringed, and then placing the burden on the state to justify the infringement. Note, *Anderson v. Celebrezze: The Ascendancy of the First Amendment in Ballot Access Cases*, 15 U. Tol. L. Rev. 385, 387 (1983).

CONCLUSION

Significant partisan gerrymandering exists in this nation and is effective in limiting and chilling the exercise of first amendment rights. Computer technology has now advanced to the stage that the voting rights of members of political parties can be severely truncated in a manner consistent with population equality and racial equity. By limiting competition in the electoral process, gerrymandering inhibits voters from exercising, through collective action, their right to change their elected officials. The vitality of America's political parties—and the integrity of our representational government—are at stake. The judgment of the district court should be affirmed.

Respectfully submitted,

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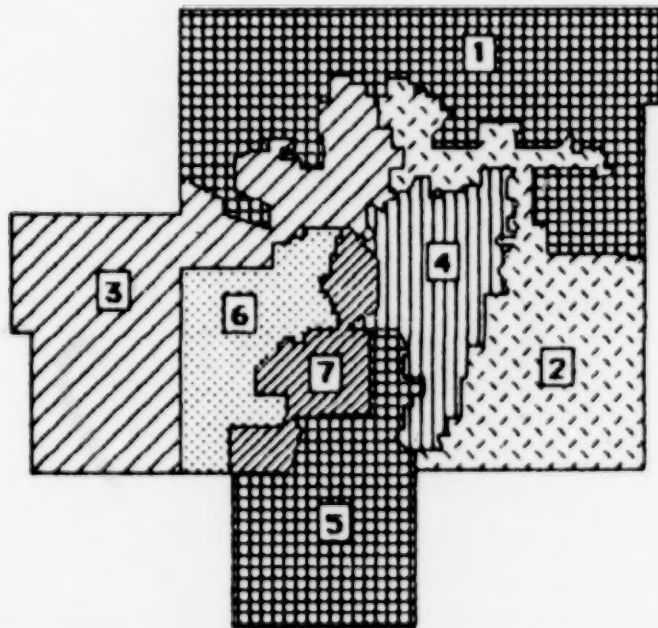
June 17, 1985

APPENDIX

1a

**HYPOTHETICAL DEMOCRATIC GERRYMANDER
MARION COUNTY, INDIANA (AND ENVIRONS)
ASSEMBLY DISTRICTS**

DEM. = 11 REP. = 4



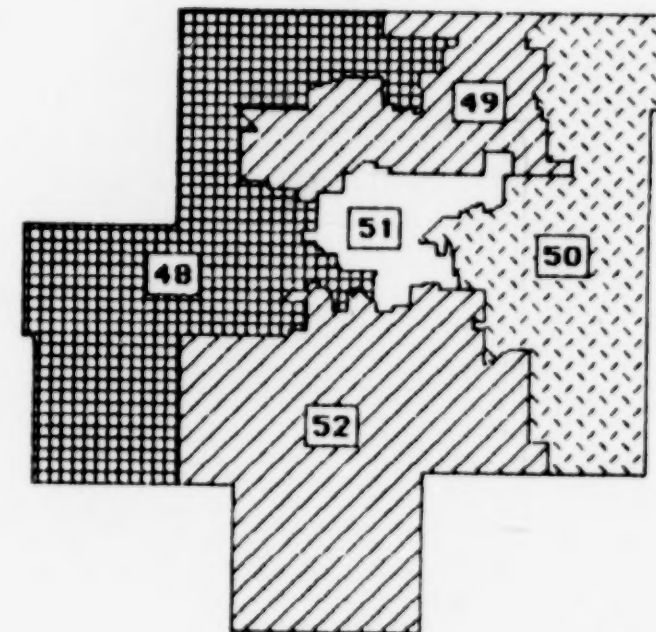
**SINGLE MEMBER DISTRICTS: 5, 6, 7
THREE MEMBER DISTRICTS: 1, 2, 3, 4**

**SOURCE: POPULATION DATA - U.S. BUREAU OF THE CENSUS
(P.L. 94-171 MAGNETIC TAPE FILE FOR INDIANA).
VOTING DATA: COUNTY CLERKS OF HENDRICKS, JOHNSON
AND MARION COUNTIES AS COMPILED BY REPUBLICAN
NATIONAL COMMITTEE, COMPUTER SERVICES DIVISION,
POLITICAL ANALYSIS DEPARTMENT, PRECINCT DEVELOPMENT.**

2a

**EXISTING LEGISLATIVE DISTRICTS
MARION COUNTY, INDIANA (AND ENVIRONS)
STATE ASSEMBLY DISTRICTS**

DEM. = 3 REP. = 12



JUN 17 1985**ALEXANDER L. STEVAS,**
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, et al.,

Appellants,

v.

IRWIN C. BANDEMER, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES SUPREME COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

**BRIEF OF
THE AMERICAN CIVIL LIBERTIES UNION
AND THE INDIANA CIVIL LIBERTIES UNION
AS AMICI CURIAE**

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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a national organization comprising more than 250,000 members. The Indiana Civil Liberties Union (Indiana CLU) is the Indiana affiliate of the ACLU with over 2,500 members statewide. The ACLU and its affiliates have been traditionally devoted to the protection and enhancement of fundamental liberties and basic civil rights.

Within a representative democracy, no right is more fundamental than the "equal right to vote." Evans v. Cornman, 398 U.S. 419, 426 (1970). Accordingly, this Court has repeatedly recognized the importance of rights of meaningful electoral participation and political association.

The instant controversy, involving the constitutionality of Indiana's apportionment statute, deeply implicates these important political and associational interests.

Indeed, it is the position of amici that Indiana's attempt, through its apportionment statutes, to favor members of the Republican Party and disadvantage Democratic Party members abridges fundamental rights of political expression and association.

With the consent of the parties indicated in letters being lodged with the Clerk, amici respectfully submit this brief to advance their position to this Court.

INTRODUCTION AND
SUMMARY OF ARGUMENT

In Williams v. Rhodes, 393 U.S. 23 (1968), this Court reviewed Ohio's ballot access statutes, which had rendered it extraordinarily difficult for any political party other than the Republican and Democratic parties to appear on the ballot. In defense of its laws, the State of Ohio maintained that its statutory provisions advanced the governmental interest of promoting the two-party system. The Court, however, rejected this defense. It noted that "the Ohio system does not merely favor a 'two-party system'; it favors two particular parties--the Republicans and the Democrats--and in effect tends to give them a complete monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the

core of our electoral process and of First Amendment freedoms." Id. at 32. Thus, the Court concluded that Ohio's attempt to protect the political status quo was impermissible and unjustified.

The Indiana statutes at issue here have been found by the court below to represent a clear and unambiguous effort to freeze the political status quo. In this case, Indiana seeks not merely to advantage the two major parties at the expense of third parties. Rather, as found by the District Court, the Indiana apportionment statutes were enacted for the purpose of advantaging the Republican Party and discriminating against all other parties, including Democrats. As such, the Indiana statutes, like the Ohio scheme in Williams v. Rhodes, conflict with fundamental values respecting the fair competition of ideas that lie at the heart of our system of free expression, in general, and our

electoral system, in particular.

We commonly understand that our system of free expression depends upon a marketplace of ideas, an environment in which policies and programs compete for acceptance by the American people. Fundamental to that understanding is the notion that a fair ideological competition is most successfully assured if we require that, in regulating the political or ideological activities of its citizens, government remain a neutral referee. It cannot favor one speechmaker over another. Nor can it favor one ideological association or political party over others. This command of governmental neutrality represents a prominent constitutional principle under both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

In a real sense, our electoral system is simply a more formalized and structured

marketplace of expression. It is an organized competition of ideas presented by opposing candidates and political parties. Accordingly, for this electoral competition to operate fairly government must remain neutral. It cannot intentionally structure the rules so as to fix the result or foreordain the outcome. It cannot enact laws designed to petrify the political process or skew the fairness of the electoral competition. That is what Indiana has done here. In its purposeful attempt to advantage Republicans and disadvantage Democrats, the Indiana legislature has violated a fundamental obligation of governmental neutrality--an obligation that has its source in the First and Fourteenth Amendments.

Moreover, the process by which Indiana engaged in apportionment violated fundamental notions of fairness. Indiana employed legislative techniques that permitted the

delegation of the mapmaking function to the Republican Party. The process excluded meaningful participation by anyone other than Republican Party leaders. It involved no serious or deliberative legislative debate. In these respects, Indiana's apportionment procedures violated basic due process principles which are also secured by the First and Fourteenth Amendments in the circumstances presented here.

ARGUMENT

- I. INDIANA'S PURPOSEFUL ATTEMPT, THROUGH THE ENACTMENT OF ITS APPORTIONMENT STATUTE, TO ADVANTAGE REPUBLICAN PARTY ADHERENTS AND DISADVANTAGE SUPPORTERS OF THE DEMOCRATIC PARTY VIOLATES CONSTITUTIONAL NEUTRALITY PRINCIPLES WHICH HAVE THEIR SOURCE IN BOTH THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

When a state enacts laws which define the structure and operation of its political institutions it must do so with "the aim of providing a just framework within which diverse political groups in our society may fairly compete...." Hunter v. Erickson, 393 U.S. 385, 393 (1969) (Justice Harlan concurring). This obligation of governmental fairness and neutrality originates, as a matter of judicial precedent, in a line of cases involving state regulation of First Amendment access to public facilities. This

requirement of neutrality extends however, with compelling logic and precedent, whenever, as here, a state is regulating its electoral processes.

A. General Neutrality Principles

Basic to our system of free expression is the proposition that government must remain neutral with respect to the ideological or associational activity of its citizens. This Court has repeatedly insisted that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department v. Mosley, 408 U.S. 92, 95 (1972).

The First Amendment's prohibition against governmental favoritism regarding the content of speech extends to a prohibition against the state favoring or disfavoring certain citizens because of their political

affiliation or associations. This basic theme has been consistently articulated by the Court. In NAACP v. Button, 371 U.S. 415, 445 (1963), the Court observed:

"The Constitution protects expression and association without regard to the race, creed or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity or social utility of the ideas and beliefs which are offered."

This theme, commonly described as the "neutrality" principle, has been most frequently invoked where the state has either created a public forum or where a governmental entity is supervising First Amendment access to a public facility. For example, when a municipality regulates speech-making access to the streets, sidewalks or parks it cannot make judgments about who may or may not speak based upon what might be said or the associational affiliation of the speaker. Niemotko v.

Maryland, 340 U.S. 268 (1950); Fowler v. Rhode Island, 345 U.S. 67 (1953).¹

1. In Fowler, supra at 69, Justice Douglas wrote: "On oral argument before the Court the Assistant Attorney General further conceded that the ordinance as construed and applied, did not prohibit [all] church services in the park. Catholics could mass in Slater Park and Protestants could conduct their church services there without violating the ordinance....That broad concession made in oral argument, is fatal to Rhode Island's case. For it plainly shows that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one. In Niemotko v. Maryland [citations omitted], we had a case on all fours with this one. There a public park, open to all religious groups, was denied to Jehovah's Witnesses because of the dislike which the local officials had of these people and their views. That was a discrimination which we held to be barred by the First and Fourteenth Amendments."

This proposition was advanced most forcefully in Police Department v. Mosley, supra. Mosley invalidated a Chicago ordinance which selectively granted the right to picket based upon the content of the speech and the labor union affiliation of the speakers. The Court declared (408 U.S. at 96):

"[U]nder the Equal Protection clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say."

As the preceding discussion from the Mosley opinion suggests, there may be some

disagreement as to whether the neutrality principle derives its doctrinal source from the First Amendment or the Equal Protection Clause. (See, e.g., Justice Frankfurter's concurring opinion in Fowler v. Rhode Island, 345 U.S. at 70.) But whatever the source, the "neutrality" principle is firmly established within our constitutional jurisprudence.

The constitutional neutrality principle applies in contexts far beyond the mere regulation of access to parks and sidewalks. See, e.g., Elrod v. Burns, 427 U.S. 347 (1976) (the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments); Widmar v. Vincent, 454 U.S. 263 (1981) (university violated neutrality principles in refusing to permit a religious group to meet on campus in a

classroom when other groups were granted access to the campus); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion."); Board of Education v. Pico, 457 U.S. 853, 870-71, 907 (at least six justices of this Court agreed that "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students.")

To say that, in each of the above-described situations, there existed a constitutionally mandated obligation of neutrality is not to say that the government is, in all instances, disabled from

adopting ideological positions. Clearly there are many situations where government communicates ideas and policy positions. It does so "through the manipulation of symbols and images, ceremonies, written words, laws, speeches, meetings, debates, and in a myriad of other ways." Yudof, When Government Speaks 5 (1983). And clearly there are instances in which the policy statements of government correspond almost precisely with ideological positions adopted by a particular political group or party. Thus the neutrality principle does not apply when government is itself enacting or articulating substantive policy.

But, when the state is regulating or administering the essential mechanisms of democratic self-government, the principle of governmental neutrality applies in full force. The neutrality principle is the normative doctrine that guarantees democratic

self-government through a marketplace of ideas. This marketplace concept, described by Professor Thomas Emerson, holds that, "[t]hrough the acquisition of new knowledge, the toleration of new ideas, the testing of opinion in open competition, the discipline of rethinking its assumptions, a society will be better able to reach common decisions that will meet the needs and aspirations of its members."² So understood, government neutrality is seen as a necessary condition to permit the ideological competition to proceed fairly and without inhibition.

B. The Neutrality Principle In The Regulation Of Electoral Processes.

The neutrality principle acquires a special force in cases involving the regulation of our electoral system. In a very real sense, our electoral system is simply a more formalized and structured

2. Emerson, Toward a General Theory of the First Amendment (Vintage, 1967) at 8.

marketplace of expression. It is an organized competition of ideas presented by opposing candidates and political parties. As such, the obligation of governmental neutrality takes on heightened importance. For unless government remains neutral in fashioning and administering the rules of the contest, the electoral competition cannot operate fairly.

If a state were to rig voting machines so that they could only register the votes cast for Democratic candidates, no one would doubt that the state was not playing fairly, in a clear violation of neutrality principles. Although acts of favoritism by the state will rarely, if ever, be that transparent, courts have carefully scrutinized, and where appropriate invalidated, legislative enactments obviously designed to favor particular political parties or groups.

In Williams v. Rhodes, 393 U.S. 23 (1968), this Court examined Ohio's ballot access statutes, and noted that "the Ohio laws...give the two established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens upon both the right to vote and the right to associate." Id. at 31. Upon finding that the Ohio statutes were designed merely to favor the Republican and Democratic parties, the Court invalidated Ohio's electoral scheme.

In Carrington v. Rash, 380 U.S. 89 (1965), this Court struck down a Texas constitutional provision that prohibited members of the armed forces who moved to Texas during their military duty from voting in that state so long as they remained in the military service. The state argued that the provision was necessary to prevent military personnel from "taking over" civilian

communities near military bases. This Court stated that, "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." Id. at 94.

In First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) the Court invalidated a statute that prohibited banks and business corporations from engaging in certain campaign expenditures in connection with referendum elections. The Court regarded this attempt to prevent corporations from participating in the campaigns surrounding referendum elections as "an impermissible legislative prohibition of [electoral] speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues...."

Id. at 784.³

In Greenberg v. Bolger 497 F. Supp. 756 (E.D.N.Y. 1980), a federal district court struck down the provision of the Postal Service Appropriation Act of 1980 which conferred reduced third-class mailing rates upon the Democratic and Republican parties but excluded other political parties competing for federal office in that presidential election year. According to the

3. See also Hunter v. Erickson, 393 U.S. 385, 393 (1969) (Harlan, J., concurring) (invalidating charter provision subjecting fair housing ordinances to unique referendum procedure as an unconstitutional attempt to rig the political process in such a way as to unfairly hinder "one group in its struggle with its political opponents"); Washington v. Seattle School District, 458 U.S. 457, 462 (1982) (embracing the neutrality and procedural fairness issues articulated by Justice Harlan in Hunter, and invalidating a Washington statute as designed to "place special burdens on the ability of minority groups to achieve beneficial legislation.")

district court: "Congressional debate demonstrates--what is clear from the provision itself--that the 1980 limitation was adopted to reserve the special rate for the two dominant political parties while denying it to others." Id. at 765. The Greenberg Court held such favoritism to be invidiously discriminatory and constitutionally impermissible. Accord, Spencer v. Herdesty, 571 F. Supp. 444 (S.D. Ohio 1983). See also, Shakman v. Democratic Organization, 481 F. Supp. 1315 (N.D. Ill. 1979).

Purposeful invidious discrimination has also been found where districting plans were employed "to minimize or cancel out the voting strength of racial or political elements of the voting population." Fortson v. Dorsey, 379 U.S. 433 (1965). Such purposeful discrimination has been identified in a long-line of vote dilution cases

stretching from Gomillion v. Lightfoot, 364 U.S. 339 (1960)⁴ to Rogers v. Lodge, 458 U.S. 613 (1982). See also, White v. Regester, 412 U.S. 755 (1973); Abate v. Mundt, 403 U.S. 182, 184 n. 2 (1971).

These vote dilution and reapportionment cases implicitly recognize that when a state regulates its election machinery and when it defines electoral boundaries, it must do so in a neutral and even-handed way. See, e.g., Reynolds v. Sims, 377 U.S. 533, 565-566 (1964). In this regard, Gaffney v. Cummings, 412 U.S. 735 (1973), is particularly instructive.

At issue in Gaffney was whether Connecticut violated the Fourteenth Amendment by taking partisan politics into account when

4. Although the Court in Gomillion based its decision explicitly upon the Fifteenth Amendment, "the Court has subsequently treated Gomillion as though it had been decided upon equal protection grounds." Karcher v. Daggett, ___ U.S. ___, 77 L.Ed. 2d 133, 153 (Justice Stevens concurring).

it fashioned its reapportionment plan. Specifically, a redistricting plan, drawn up by a bipartisan commission of four Republicans and four Democrats, "adopted and followed a policy of 'political fairness,' which aimed at a rough scheme of proportional representation of the two major political parties." Id. at 738. Recognizing that there might be some instances where a legislature might invidiously attempt "to minimize or eliminate the political strength of a group or party." (Id. at 754), the Court found no such impermissible purpose at work in Gaffney. On the contrary, the Court found the Connecticut legislature to have been motivated by principles of fairness and neutrality. Accordingly, the statute was

upheld.⁵

More recently in Karcher v. Daggett, ___ U.S. ___, 77 L. Ed. 2d 133 (1983), the Court invalidated New Jersey's congressional districting plan. The Court's opinion rested upon the conclusion that the New Jersey plan was neither mathematically equal nor the product of a good-faith effort to achieve population equality among districts. Again, the Court implicitly found that those engaged in designing the districts had not fulfilled their constitutional obligation to act in a fair and even-handed manner. In a concurring opinion Justice Stevens reached this conclusion explicitly. Justice Stevens

5. This Court correctly found a similar absence of invidiously discriminatory intent in United Jewish Organizations v. Carey, 430 U.S. 144 (1977). In the Court's view, the New York plan at issue there sought "to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of power between white and nonwhite voters in Kings County." Id. at 167.

observed:

"The Equal Protection Clause requires every State to govern impartially. When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community....If they serve no purpose other than to favor one segment--whether racial, ethnic, religious, economic, or political--that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection." Id. 77 L. Ed 2d at 153.

In sum, there is a common thread that runs through this Court's voting rights cases. It holds that government has a general obligation to act in a fair and neutral manner when it regulates the electoral system. To be sure, states will be given wide latitude in their discharge of this obligation. But when a state exercises its regulatory authority over the electoral system for the clear purpose of fencing some voters out of the political process such

purposeful discrimination will be found violative of the First and Fourteenth Amendments.

C. The Impermissible Motive Underlying The Indiana Statute.

In the present case--even more than in Williams, Carrington, and Bellotti, and unlike Gaffney--an impermissible legislative purpose is evident. Here, Indiana legislators clearly and "unashamedly" conceded that the apportionment statute was designed to advantage Republicans over Democrats. Bandemer v. Davis, 603 F. Supp. 1479, 1484 (S.D. Ind. 1984). And the Court below expressly found "that the reapportionment plan was conceived to accomplish political discrimination and operated as a purposeful device to do so."

603 F. Supp at 1491.⁶

Of course, there will be some cases where the legislative purpose is ambiguous. There will undoubtedly be cases where partisan political considerations will infiltrate legislative judgments that rest predominantly upon other grounds. Indeed, where a legislative enactment rests upon permissible non-partisan grounds and where an unintended consequence of such enactment is to benefit a particular political party, amici advance no claim that such an enactment violates neutrality principles. See generally Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977).

But such is not the case here. This

6. In this regard, the district court findings of fact on the matter of invidious purpose, including inferences drawn from the lower court's underlying fact-finding may be overturned only if clearly erroneous. Rogers v. Lodge, supra; Bessemer v. Anderson, U.S. , 53 U.S.L.W. 4314 (March 19, 1985).

Court has repeatedly and carefully scrutinized enactments which rest upon impermissible motives. See Gomillion v. Lightfoot supra; Hunter v. Erickson, supra; Washington v. Seattle School District, supra; Wallace v. Jaffree ___ U.S. ___, 53 U.S.L.W. 4665 (June 4, 1985). It has developed the techniques for conducting such an inquiry. See Village of Arlington Heights v. Metropolitan Housing Corp. 429 U.S. 252 (1977); Mt. Healthy Board of Education v. Doyle, supra; Rogers v. Lodge, 458 U.S. 613 (1982).

In this case a three-judge district court conducted the sort of "sensitive inquiry" demanded by the above-cited cases and concluded that the present enactment was motivated by an expressed desire to advantage Republicans and disadvantage Democrats. The district court quite properly found that this motive was invidious and impermissible. For,

in behaving in this fashion, the political majority sought to use its transitory dominance to enhance its power at the expense of its rivals by rigging the rules of the political game.

II. THE PROCESS BY WHICH INDIANA
ENGAGED IN REAPPORTIONMENT
VIOLATED FIRST AMENDMENT DUE
PROCESS PRINCIPLES.

In Anderson v. Celebrezze, 460 U.S. 780 (1983), this Court held that the right of voters to organize within a political party and to have that party fairly compete for electoral office is an associational right protected by the First Amendment.

This Court has also repeatedly recognized that the process by which government seeks to regulate areas infused with First Amendment values can be critical in protecting fragile First Amendment freedoms. Thus, modern First Amendment jurisprudence frequently relies upon a number of process-based rules such as the doctrine of prior restraint, Organization for a Better Austin v. Keefe, 402 U.S. 419 (1971); New York Times v. U.S., 403 U.S. 714 (1971);

First Amendment overbreadth principles Gooding v. Wilson, 405 U.S. 518 (1972); Grayned v. City of Rockford, 408 U.S. 114 (1972) and the procedural requirements established in Freedman v. Maryland, 380 U.S. 51 (1965), all of which serve as prophylactic measures to guard against arbitrary and even inadvertent encroachments upon First Amendment freedoms.

The problem of political gerrymandering posed by the present case may be precisely the sort of issue that can best be resolved by a process-based approach. This is so because, as Justice White, pointed out in Gaffney v. Cummings, supra, when legislators are asked to fulfill any function, including redistricting, some degree of political bargaining is inevitable. Indeed, partisan political judgments of one sort or another seem inescapable. Id., 412 U.S. at 753. At the same time, and as Justice White also

suggested in Gaffney, at a certain point partisan judgments can become invidious when they are motivated by a desire to completely cancel out the political opportunities of particular racial, ethnic or political groups. 412 U.S. at 754. The line between acceptable and unacceptable political gerrymandering may be difficult to define after the fact.

In light of this state of affairs, it may very well be that the constitutional wrong in a case such as this is best understood as a failure of process. And the constitutional remedy lies in the development of fair and even-handed procedures for reapportionment. Focusing upon process advances two salutary goals: First, it minimizes the danger that First Amendment neutrality principles will be violated during the reapportionment enterprise; second, it minimizes the need for difficult judicial

inquiries into impermissible motive.

In the present case the process employed to enact the reapportionment laws failed utterly to satisfy rudimentary notions of fairness. Both the Senate and the Assembly reapportionment bills were enacted initially without describing any legislative districts. As the District Court observed: "In practical terms, the bills were blank, the amendments insignificant, and the sole purpose for this contrived legislative process was to refer both bills to a conference committee." 603 F. Supp. at 1483. The District Court further concluded that "[t]he political structure of the conference committee introduce[d] a crucial element into the legislative scheme chosen by the Republican majority in both houses of the General Assembly. All conferees were Republicans....All were members of their legislative body's respective elections and apportionment

committees. The lone Democrats with any input in the conference process were four persons appointed as 'advisors'....The Democratic advisors had no committee vote and no access to the mapmaking process that ensued." 603 F. Supp. at 1483.

In this regard, the legislature abandoned its responsibility to develop a fair reapportionment plan, and, instead delegated that responsibility to a self-interested political party. It delegated lawmaking authority to an entity that was responsive to only one segment of the political community. See Industrial Union v. American Petroleum Institute, 448 U.S. 607, 686 (1980) (Justice Rehnquist concurring); See also Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 77 L. Ed 2d 317 (1983); Larkin v. Grendel's Den, 459 U.S. 116 (1983).

Moreover, the mapmaking procedure

apparently entailed no serious deliberative debate. For example, a leading Republican Senator candidly warned the Democrats that their role during the reapportionment would be entirely devoid of substance. "You will have the privilege to offer a minority map," the Republican was quoted as telling the Democrats, "[b]ut I will advise you in advance that it will not be accepted." Id. at 1484. The warning proved accurate. The Democrats did offer a map. But "[a]fter a limited floor debate, the conference committee report was introduced for vote in both houses of the General Assembly." Id. Both houses adopted the reapportionment legislation along strictly party lines. In sum, the process by which the reapportionment statutes were enacted cannot fairly be characterized as a serious deliberative process in which the political community meaningfully participated. See Karcher v.

Daggett, supra, 77 L. Ed 2d at 160 (Justice Stevens concurring). It was dominated not by neutral principles of legislative cartography but by pure partisanship.

The late Professor Robert Dixon, Jr., attorney for the State of Connecticut in Gaffney, and a leading expert on reapportionment, has proposed the bipartisan commission as the best solution to the problem of discriminatory districting. Comparing the role of such a commission to that of the Federal Trade Commission in limiting unfair competition, Dixon has written that "The most important injunction is that in its necessary consideration of data on electoral behavior the redistricting body should do so to test and discard unfair plans and not for the purpose of manufacturing artificial majorities....The rule should be sameness or fairness of treatment to all parties, that is, neutrality

in this special sense....I submit that it should be unthinkable to pick as the final redistricting plan, from among the many 'equally equal' plans available in population terms, the plan that predictably favors one party over another at the instant of enactment." Dixon, "Fair Criteria and Procedures for Establishing Legislative Districts," in Representation and Redistricting Issues 7, 11 (B. Grofman, A. Lijphart, R. McKay and H. Scarrow, eds. 1982) (originally presented as testimony on S. 596, "A Bill to Provide a Fair Procedure for Establishing Congressional Districts," before the Committee on governmental Affairs, U.S. Senate, June 20, 1979.)

Clearly Professor Dixon's proposal is not the only way that reapportionment can be accomplished in a procedurally fair manner. But however procedural fairness is defined, the process used to develop Indiana's

apportionment laws must be found wanting. In the present case Indiana failed to fulfill rudimentary notions of procedural fairness. In so doing Indiana has violated First Amendment due process principles which can and should be found applicable to the question of political gerrymandering.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Southern District of Indiana should be affirmed.

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